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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1441

KEVIN H. WHITE,
Mayor of the City of Boston,
Petitioner,

—v.—

TALLULAH MORGAN, *et al.*, and
JOHN J. KERRIGAN, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner Kevin H. White, as Mayor of the City of Boston, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit in the above-entitled case.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported, but is reprinted in the Appendix hereto, p. 1a, *infra*. The opinion of the District Court for the District of Massachusetts is reported at 401 F. Supp. 216 and is reprinted in the Appendix, p. 54a, *infra*.[1] Previous opinions of the Court of Appeals and of the District Court in this litigation are reported at 509 F.2d 580 and 379 F. Supp. 410.

[1] The appendix to this petition is hereafter cited as "App."

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JURISDICTION

The judgment of the Court of Appeals was entered on January 14, 1976. (App. 52a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The basis of jurisdiction in the District Court was 28 U.S.C. § 1343(3).

QUESTIONS PRESENTED

1. Whether the District Court, which had before it two different plans both of which would eradicate school segregation "root and branch," erred in refusing, as a matter of law, to consider the extent of busing, the cost, community acceptance, and the potential for resegregation of the schools when choosing between the two plans?[2]

2. Whether the Equal Educational Opportunities Act of 1974, 20 U.S.C. §§ 1701 *et seq.*, required the District Court, in choosing between two desegregation plans, both of which would have satisfied the constitutional mandate to eradicate segregation, to adopt the plan which involved less busing of students?

INTRODUCTORY STATEMENT

This petition concerns the remedy phase of the Boston school desegregation litigation. The remedy phase is of particular importance because, regardless of the conclusion reached in the liability phase, the actual prospects for meaningful desegregation in Boston, and the social and

[2] The two plans involved are the plan drawn up by the Masters appointed by the District Court and the District Court's own plan. See pages 14-20, *infra*.

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economic effects on the City, will vary greatly depending upon the nature of the remedial decree.

The Mayor's interest in these proceedings is the maintenance of Boston's social stability and financial integrity amidst the far reaching, and in some instances traumatic, changes required to protect the constitutional rights of the City's school children.

This case poses a critical problem common to the urban areas throughout the United States: the extent to which, as a matter of law, courts must consider such practicalities as costs, community support, amount of busing, and potential for resegregation in choosing among a number of plans, each of which will eradicate segregation. As the tables at pages 23 and 25, *infra,* indicate, this case presents a vivid example of the adoption by courts of the most extreme measures when more moderate ones will fully satisfy the requirements of the Constitution and will yield important social, educational, and economic benefits to the community.

In the earlier liability phase of this case the District Court found, and the Court of Appeals agreed, that the Boston School Committee (an elected body independent of the Mayor's control) had maintained a dual and unconstitutionally discriminatory school system. Those findings are supported by the record, are final, and are not contested by petitioner.

Indeed, the Mayor was not a party to this litigation during the District Court's consideration of liability. After its finding of segregation, however, the District Court ordered the Mayor added as a defendant with respect to

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the remedy phase of the litigation[3] because he is responsible for the public safety and finances of the City of Boston, including limited financial control over the Boston public school budget.[4]

After the Mayor was joined as a defendant, the District Court entered an order adopting the school desegregation plan which is the subject of this petition. As described further below, the District Court had appointed a panel of four distinguished Masters who held hearings and took detailed account of the particular requirements of the Boston school system. The Masters then recommended a plan which would have eliminated "root and branch" the segregation previously found to exist. The District Court, however, rejected the Masters' plan in significant respects.

As explained below at pages 22-26, there was very little difference in potential for desegregation between the Masters' plan and the District Court plan. Yet the District Court explicitly refused to consider the fact that its plan required the busing of 6,000 more students than did

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[3] The Mayor was added as a defendant by an order entered on September 30, 1974.

[4] The School Committee is an elected body of five members. It controls operation of the schools independently of the Mayor's general executive powers. Under the provisions of Mass. St. 1963 c. 786, § 3, as amended, the Boston School Committee may appropriate such amounts for the operation of the schools as it had available the preceding year with certain additions, but any additional amounts must be requested from the Mayor and City Council. All these amounts, including those appropriated by the School Committee, come out of funds raised by the City's general taxing powers. Thus the School Committee's spending directly and substantially affects the City's budget and its financial standing. In addition, under Mass. St. 1966 c. 642 a department subject to the Mayor's authority has responsibility for new school construction.

the Masters' plan, that the Masters' plan was well accepted in the community, and that its own plan provoked substantial hostility. Moreover, the District Court ignored all cost considerations and would not consider the possible effects of resegregation caused by its plan. Indeed, the District Court in ordering, and the Court of Appeals in cursorily affirming, those portions of the plan at issue here held that these factors are legally irrelevant. As a consequence, in choosing between two constitutionally-satisfactory plans, the courts below chose to impose the most costly plan, the plan most burdensome to students, the plan least acceptable to the community, and the plan most likely to cause resegregation of the schools.

Boston, in common with other large American cities, is currently encountering major social and economic stresses. Under these circumstances, a reorganization of the City's most basic and visible every-day function—its school system—which does not consider practicalities such as cost, burden on students, community support, and resegregation, is bound to have a disruptive impact on the social framework of the City and on the City's ability to meet the needs of its residents. The result in Boston, as elsewhere, has been social unrest, dissatisfaction with the schools, and an entirely unnecessary setback to the cause of meaningful desegregation.

The courts below evidently believed that imposition of the more onerous desegregation plan was required by this Court's prior holdings. In the Mayor's view this conclusion was incorrect. This Court's emphatic mandates to eliminate segregation promptly and thoroughly—expressed in cases where desegregation efforts were plainly dilatory or inadequate—cannot properly be interpreted as auto-

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matically requiring district judges to adopt the most extreme among a number of alternatives, each of which would fully eliminate segregation. Yet, as this case indicates, oft-quoted phrases from this Court's prior opinions can become slogans used to dignify results that are injurious to desegregation and to the viability of the City.

This case presents the occasion for this Court to clarify its directive to achieve the greatest possible degree of actual desegregation, "taking into account the practicalities of the situation," by the adoption of "workable" school desegregation plans. *Davis* v. *Board of School Commissioners,* 402 U.S. 33, 37 (1971); *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 31 (1971). This question is of major importance not only to Boston, but to the future of desegregation and civic vitality in all urban areas of this country. It is deserving of this Court's attention.

STATUTE INVOLVED

The relevant sections of the Equal Educational Opportunities Act of 1974, 20 U.S.C. §§ 1701 *et seq.,* are reproduced in the Appendix, *infra,* at 109a.

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STATEMENT OF THE CASE

1. *Prior Proceedings in this Litigation Resulted in a Finding of Segregation.* On June 21, 1974, the District Court issued its opinion in the liability phase of this litigation. The District Court held that the Boston School Committee had knowingly carried out a systematic program of segregation which affected all of the City's students, teachers, and school facilities and which intentionally established and maintained a dual school system. 379 F. Supp. at 482. As noted earlier, the Mayor was not a party to this litigation during the District Court proceedings on liability. No party to this litigation has ever suggested that he had any responsibility for creating or maintaining the dual school system.

2. *Desegregation Plans Were Submitted by the Parties Pursuant to Court Order.* On October 31, 1974, the District Court directed the School Committee to develop and file a desegregation plan for the Boston schools no later than December 16.[5] The court also ordered that the other parties and any interested community groups would have until January 20, 1975, to file criticisms of the School Committee plan or to file alternative plans. Ultimately, three plans were filed pursuant to the court order—one prepared by the School Committee staff and submitted to the District

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[5] For one school year while the District Court formulated the final order on remedy which is the subject of this petition, the court ordered the Committee to comply with a preexisting racial balance plan drawn up by the State Board of Education pursuant to the Massachusetts Racial Imbalance Law. Mass. Gen. Laws Ann. c. 71, §§ 37C and D and c. 15, §§ 1 I., J. and K. See also *School Committee* v. *Board of Education*, 1973 Mass. Adv. Sh. 275, 292 N.E.2d 870 (1973).

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Court although not approved by the School Committee ("the December 16 plan"); one approved by the School Committee; and one prepared by the plaintiffs.[6] Criticisms and evaluations of the various plans were then filed by a number of parties, including the Mayor.

3. *The District Court Appointed Well-Qualified Masters to Examine the Parties' Proposals and to Recommend a Desegregation Plan.* In view of the complexity of the issues and the numerous suggestions as to appropriate remedies, the District Court, pursuant to FRCP 53, appointed a racially integrated panel of four Masters. The Masters were instructed to hold hearings on the adequacy of the three proposed plans and, if none of them satisfied constitutional requirements, to submit a plan of their own. The Masters were Jacob J. Spiegel, a retired Justice of the Massachusetts Supreme Judicial Court; Francis Keppel, a former United States Commissioner of Education and a former Dean of the Harvard School of Education; Edward J. McCormack, Jr., a former Attorney General of the Commonwealth of Massachusetts; and Charles V. Willie, a professor at the Harvard School of Education. To aid the Masters, the District Court appointed two experts, Dean Robert A. Dentler and Professor Marvin B. Scott of the Boston University School of Education.

4. *The Masters Gave Consideration to Social and Financial Implications of the Desegregation Plans.* The Masters held eleven days of evidentiary hearings and personally

[6] In addition, the Boston Home and School Association filed a proposed plan. On February 5, 1975, the District Court, after a hearing on the Home and School Association's plan, held that the plan would not be considered because it was constitutionally inadequate. (App. 65a).

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visited the City's neighborhoods and the schools in operation. Counsel for all parties and for a number of community organizations participated in the hearings, which dealt at length with the merits and drawbacks of the plans and suggestions made by the parties and community groups. The Masters then considered in detail the material presented to them by the parties, the views expressed by representatives of the community, and their own knowledge and available published materials on the City of Boston and its school system. This information included the following:

(a) *Boston's Demography.* Most of Boston's neighborhoods started as independent and distinctive cities and towns and were incorporated into the City of Boston as they grew together in the course of the 19th and 20th centuries. S. Warner, Streetcar Suburbs: The Process of Growth in Boston 1870-1900, 35-43 (Athenaeum ed. 1973) (hereinafter cited as Warner). As a result, Boston resembles a confederation of small towns more than it does a cohesive city. Moreover, the growth of Boston and its neighboring towns was by no means orderly or comprehensive. For example, Charlestown, which has been a part of Boston since 1873, is separated from the rest of the City by Boston Harbor and the Charles River and is surrounded on its land approaches by the separate cities of Somerville and Cambridge. Similarly, the Brighton-Allston district of Boston is connected to the rest of the City by a strip of land a few hundred yards wide and is otherwise separated from the City by the independent town of Brookline. There are still more than 50 separately incorporated cities and towns within easy commuting distance of downtown.

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Boston has received successive waves of newcomers virtually since its founding by English colonists in 1630. These include Irish, Italians, Portuguese, Polish, Chinese, Blacks, Spanish-surnamed, and Greeks. See generally O. Handlin, Boston's Immigrants (Athenaeum ed. 1971). New arrivals have tended to settle—and their descendants to remain—in particular neighborhoods. For example, the North End and East Boston have retained their character as Italian neighborhoods for more than 50 years and Charlestown and South Boston have been largely Irish in composition for at least that period of time. See generally Warner, *supra.*

Due to the geographic isolation of many areas of Boston and the settlement of various neighborhoods of the City by different ethnic groups, the people of Boston to this day have maintained a strong ethnic cohesion and deep-rooted traditional attachment to their neighborhoods. These qualities can serve as a source of strength and vitality in a large city, and in that respect should not be needlessly disrupted. They can also, of course, create an impediment to school desegregation, especially if residents are led to feel that their ethnic and neighborhood attachments are being disregarded. As explained below, the Masters displayed concern for these factors and an ability to deal with them in a constructive fashion.

(b) *Boston's Precarious Financial Condition.* In the past two decades Boston, in common with most urban areas in this country, has experienced a drastic emigration of the middle class and a substantial immigration of low income residents. As a result, citizens of Boston have been faced with a declining tax base from which to meet vastly increasing costs for schools, hospitals, and public services.

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The table below demonstrates just how greatly the City's financial requirements have increased in recent years. As the table shows, the budget for the school system has been growing at a rate far greater than the remainder of the city budget.

	City Budget[7]	Schools	Other Services
1972	$334,176,000[8]	$105,812,000[8]	$228,364,000
1973-74[9]	$364,308,000	$119,854,667	$244,453,333
1975	$377,296,000	$126,586,000	$210,710,000
1976	$394,310,000	$154,605,000	$239,705,000

In order to support this budget level, Boston has been forced to raise the rate of its property tax, upon which it depends for most of its revenue, to the near-confiscatory level of $196.70 per $1,000 of assessed valuation. This is by far the highest property tax rate in any major city in the United States, and it is scheduled to increase still further in 1977. Despite these high taxation levels, the City has projected a 25-million dollar deficit this year (a substantial portion of which is attributable to the costs of school desegregation)[10] and this winter was at the brink of

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[7] These figures exclude the costs of contributions to county, metropolitan, and state governments, pensions, and interest.

[8] These figures do not include the projected $16 million deficit now expected in the school budget.

[9] In 1974 the City of Boston changed from a calendar to a fiscal year budget, resulting in a single eighteen-month "year" for 1973-74. The figures used for 1973-74 are adjusted to reflect the costs per twelve months.

[10] See Prospectus, City of Boston, Massachusetts, General Obligation Bonds, pp. 23-24 (February 26, 1976).

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default on certain of its financial obligations. As a result of its precarious financial situation, Boston has been forced to cancel new construction and is facing cutbacks on essential city services such as police, fire protection, and hospitals. In addition, the schools themselves are facing significant budget cuts. Quite plainly, the general welfare of both the school children and other residents of Boston required consideration of comparative costs in choosing between constitutionally adequate desegregation plans.

(c) *The Educational Problems of the Boston Public Schools.* Boston's school system is the nation's oldest, dating from the founding of the Boston Latin School on April 23, 1635.[11] But in the past thirty years in particular, the Boston public schools became increasingly deficient in the education they offered students, both black and white. See, *e.g.*, J. Kozol, Death at an Early Age (1967). Indeed, in the 1960's, a special Commission, assigned by the Commonwealth of Massachusetts to investigate schools, noted that course offerings in the Boston Schools were similar to those two generations earlier. Report of the Special Commission for the Improvement and Extension of Educational Facilities in the Commonwealth, p. 70 (1964).

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[11] Among the early students of the Boston schools were Benjamin Franklin, Samuel Adams, John Hancock, and Ralph Waldo Emerson. Catalogue of the Boston Latin School, 11, 20-22 (1957). Boston also built the nation's first multi-classroom public elementary school, the Quincy school, in 1847. Masters Report, p. 2. The Quincy School was in use until closed last year.

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Thus, in the past few years it had become widely recognized that reform and improvement of the Boston school system was a matter of some urgency. Despite the severe limitations on the City's finances, in 1969 the Mayor initiated the most extensive school building program per capita of any city in the country. But the City's limited financial resources precluded many other desirable educational advances. In light of this background, the Masters concluded that no desegregation plan would work unless it included substantial and visible educational improvements.

5. *The Masters Found that All the Plans Submitted by the Parties Were Inadequate.* Based upon all the foregoing materials and information, the Masters ultimately issued a lengthy report and detailed desegregation plan (hereinafter cited as "M.R."). In the report, the Masters unanimously found that all the plans submitted by the parties should be rejected by the District Court because they either did not promise to remedy the segregation or were educationally unsound.[12] The Masters found, how-

[12] The Masters found that the School Committee's plan was essentially a freedom-of-choice proposal which would unfairly burden the school children and their parents with taking affirmative action to undo the School Committee's prior discrimination and that the plan did not realistically promise to desegregate the schools. M.R. 9-16. The Masters next found that, while the plaintiffs' plan would effectively desegregate most portions of the school system, it was educationally inferior because it required an excessive number of school changes for certain students; provided for excessive busing; set up unnecessarily complicated zone boundaries; did not adequately provide for the educational improvements which were sorely needed by the Boston schools; and required the use of a number of school buildings which the Masters believed should be closed to preserve the physical safety of the school children. M.R. 17-25. The Masters also considered the December 16th plan submitted by the School Committee's counsel over the Committee's objections and found that plan, too, unsatisfactory because it imposed undue burdens on minority children. M.R. 27.

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ever, that each of these plans contained a number of salutary proposals. Specifically, the Masters found that the School Committee's proposal to adopt a variety of innovative programs and to offer a limited choice of schools to students and their parents would contribute to effective desegregation. They found that the use of geographic school assignments and limited transfer options generally as proposed by the plaintiffs would help to desegregate the system. And the Masters found that, in principle, the proposals of the December 16th plan with regard to establishing magnet schools with specially attractive programs would also aid desegregation. M.R. 16, 24-25, 28. The Masters concluded, however, that these steps alone would not fully desegregate the Boston school system and that a substantial amount of mandatory busing would be necessary. M.R. 29.

6. *The Masters Proposed Their Own Highly Innovative Plan.* Based upon these conclusions, the Masters, again unanimously, drew up their own plan. This plan included concepts taken from the School Committee plan, the plaintiffs' plan, the December 16th plan, and the Mayor's proposals, as well as a number of other features proposed by the Masters themselves. The Masters viewed their responsibility to the District Court as requiring them to propose a plan which would not only thoroughly desegregate the schools and improve the quality of education, but also defuse the growing hostility between the black and white communities over the school system. The salient aspects of the Masters' plan were as follows:

(a) The City would be divided into nine geographic districts containing about two thirds of the student population

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and one city-wide district containing about one third of the students. Each of the geographic districts, insofar as was consistent with desegregation, had a geographical, political, or historical basis and hence had a certain affinity of interest.

The city-wide district and three of the geographic districts, which jointly contained more than half of the school population, would reflect almost precisely the school system's racial population at the time of 50% white and 50% black and other minorities. Three other districts would be within ± 13% of the City's school population racial percentages. The final three districts would vary from the overall city-wide student racial percentage by somewhat greater margins due to housing patterns or, in one instance, geographic barriers.[13] A chart showing the racial composition by district of the Masters' plan appears at page 23, *infra*. Within the districts, each of the schools would be within ± 10% of the district racial percentages of students.

(b) There would be a number of magnet schools, in both the city-wide and local districts. These schools would have one or more specially attractive programs designed to draw students of all races to those schools and thereby increase both inter- and intra-district integration. To aid the development and enrich the content of these magnet programs, the Masters' plan provided that a number of individual schools were to be paired with specific businesses and universities located in the Boston area.

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[13] East Boston, the one district which would have maintained its character as nearly all white (and which retains that character under the District Court plan) is separated from the rest of Boston by the Boston Harbor and is easily accessible only by a tunnel. (App. 76a).

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(c) A limited choice of schools was to be offered to students and their parents. Basically, the plan would allow student choice of assignment to a school in the appropriate geographic district or in the city-wide district, insofar as consistent with the racial desegregation guidelines proposed by the Masters.

(d) District and city-wide councils of parents and others concerned with the school system were to be established to help explain and monitor the plan.

(e) Finally, the plan required the closing of a number of physically inadequate facilities, the construction of several new facilities, and the reorganization of certain parts of the School Committee's administrative apparatus to make certain that the plan was properly implemented. M.R. 31-33.

The Masters concluded that, under their plan, approximately 15,000 students would have to be bused for desegregation purposes. This amounted to about 20% of the then student population. As the charts at pages 23 and 25, *infra*, show, the Masters' plan would have thoroughly desegregated the Boston schools.

7. *The Masters' Plan Was Widely Acclaimed.* When the Masters' plan was released to the public, it received widespread acclaim for its innovative character and promise to improve the quality of the education being offered in the public schools. It also received cautious acceptance as a viable means of desegregation in a community which had been badly split by this issue for almost two years. Representatives of the black community praised the plan for its innovation and promise of meaningful improvement in the educational curricula. Boston Globe, March 23, 1975, p. 4,

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col. 4 (NAACP President); Boston Globe, March 24, 1975, p. 7, col. 4 (Freedom House spokesperson). On the other hand, a number of representatives of white neighborhood and school groups who strongly opposed busing stated that the plan was much more acceptable than they had thought it would be and that they could live with the Masters' plan even though they would prefer the elimination of busing entirely. Boston Globe, March 23, 1975, p. 4, col. 5 (anti-busing group president). Thus, while the Masters' plan provided a remedy that might not have been considered ideal by any of the communities which make up the Boston school system, and was not exactly welcomed by anti-busing groups, it had a broad degree of acceptability.

This acceptability followed from the work done by the Masters. As mentioned earlier, the Masters were not only well qualified to deal with desegregation problems but were also familiar with the City. They had excellent contacts with the minority and white communities. Accordingly, in drafting the plan, the Masters took unusual care to describe their actions to the community. They met with public officials, representatives of the Home and School Association, leaders of the black community, and others, and explained the necessity for an effective remedy to segregation in the Boston public schools and the details of the Masters' plan.

Moreover, the Masters understood that, as discussed earlier, Boston is a city of unusual neighborhood and ethnic loyalty, and they took those factors into account where constitutionally possible. Thus, they took great care in drawing district boundary lines. For example, the Masters determined to redistrict the South Boston area to include portions of neighboring Dorchester rather than portions

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of neighboring Roxbury, which contained approximately equal numbers of black students. The Masters knew that historic community ties would make the pairing of Dorchester and South Boston acceptable to both black and white residents of those neighborhoods, but that the pairing of Roxbury and South Boston would be acceptable to neither.[14] Accordingly, based on their careful consideration of the practicalities of the situation, the Masters developed a plan which would combine maximum desegregation and maximum community acceptability for stable and long term desegregation.

8. *The District Court Rejected Important Parts of the* ***Masters' Plan.***

(a) *Summary Procedure.* The Masters filed their final report and desegregation plan on March 31, 1975, and thereafter the parties to the litigation, including the Mayor, submitted suggested modifications to the plan. The Mayor also filed a motion to confirm the Masters' plan in most respects.

However, the District Court made substantial revisions in the Masters' plan. In making these revisions, Judge

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[14] It is noteworthy that most of the unfortunate violence that has marred Boston's school desegregation resulted from this pairing, which was imposed by the District Court contrary to the Masters' plan. The first such incidents occurred at South Boston High on the opening day of school in 1974. *See* Boston Globe, October 9, 1974, p. 1, col. 4. Incidents continued throughout the school year, at one point forcing the school to close for several weeks. *See* Boston Globe, January 1, 1975, p. 1, col. 3; Boston Globe, January 3, 1975, p. 1, col. 4. The Masters sought to prevent a recurrence of such incidents through their careful districting. After the rejection of the Masters' recommendations, violence continued, culminating in the District Court's placing South Boston High School in receivership.

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Garrity never conferred with the Masters. He first informed the Masters of his substantial changes only one or two days before he distributed his revisions to the parties. He then spoke with the Masters and provided them with a copy of his plan. He indicated that they might make comments but told them that the revisions he had made in their carefully thought-out district boundaries were already printed and could not be changed. Under those circumstances, the Masters did not see fit to comment further.

The next morning, the District Court held a one day hearing on its plan, which the parties had been able to consider only overnight. Ultimately, on May 10, 1975, the District Court issued its final plan, which was in all significant respects identical with its proposed plan.

(b) *Differences from the Masters' Plan.* The plan issued by the District Court differed from the Masters' plan in a number of respects. The critical difference was that the District Court restructured the geographic districts recommended by the Masters, combining two districts and changing the boundaries of four others. The District Court claimed that this restructuring was necessary because, after the Masters had rendered their recommendations, the School Committee provided an updated data base for determining the race of students in the various districts.[15] (In fact, as the tables at pages 23 and 25, *infra,* show, the revised statistics were not demonstrably more accurate than those

[15] According to the District Court, this new data showed that in two of the districts drawn by the Masters, the white enrollment was underestimated; that in another of the Masters' districts, the black enrollment was significantly underestimated; and that the number of students in the system was underestimated. (App. 74a-75a).

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upon which the Masters had based their plan.)[16] The District Court did not request the Masters to reconsider their plan to see if these new statistics would require any changes, or even to monitor the revised statistics to check their accuracy. Nor did the District Court merely make minor technical revisions in the Masters' plan to compensate for the new data. Instead, the District Court simply redrew the plan itself, and in the process ignored the careful efforts of the Masters to locate boundary lines so as to preserve community ties where possible.

The plan, as redrawn by the District Court, required the busing of at least 21,000 students for desegregation purposes—6,000 or 40% more than required by the Masters' plan. The District Court may have believed that such additional busing was necessary in light of the revised statistics, but it made no specific findings in that regard. In fact, as described in detail at pages 22-26, *infra,* the amounts of desegregation produced by the District Court plan and promised by the Masters' plan were comparable.

(c) *Failure to Consider Practicalities.* Counsel for the Mayor and others attempted to impress upon the District Court the importance of considering the amount of busing, cost, community acceptance, and resegregation problems in choosing between the court's plan and the Masters' plan since both would produce satisfactory desegregation. The District Court, however, refused to consider any of these factors. The one-page portion of the District Court opinion

[16] The only evidence as to the effect of the new statistics was the deposition testimony of John Coakley, the School Committee's Chief desegregation planner. Mr. Coakley testified that the new data were not significantly different from the data upon which the Masters' plan was based. Coakley deposition, p. 51.

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which dealt with cost considerations merely stated that busing would cost approximately $7.6 million a year and that closing a number of schools would save fuel and maintenance expense. (App. 102a-03a). The court refused to admit any evidence as to community acceptance of the two plans or possible resegregation of the school system on the ground that resistance to desegregation is irrelevant in considering remedy. (App. 71a-72a).

Finally, although the District Court made a number of findings as to the need for busing, in an effort to comply with the Equal Educational Opportunities Act of 1974, 20 U.S.C. §§ 1701 *et seq.*, the court never made any finding that the busing it ordered of 6,000 additional students was required to achieve desegregation. (App. 101a-02a). In fact, the District Court explicitly refused to consider whether the Masters' plan was a constitutionally satisfactory remedy and specifically stated that constitutional considerations were "only secondary" in its decision to make the changes in the Masters' plan which resulted in this additional busing. Transcript of April 15, 1975, hearing, pp. 7-8, 32.

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9. *The District Court's Plan Imposed Substantial Additional Burdens But Did Not Achieve Greater Desegregation Than the Masters' Plan.* As a result of the District Court's refusal to consider the practicalities of the situation, Boston is now operating under a plan which achieves no more desegregation than the Masters' plan, but which requires a great deal more busing and substantial additional expense and which has been less acceptable to the community than the Masters' plan. The following table compares racial percentages by district of the Masters' plan and the District Court's plan with those actually achieved.

As can be seen from the table, the District Court plan did in some instances propose to balance the racial percentages of students by district slightly more precisely than did the Masters' plan. In fact, however, the student percentages are now in most instances closer to those proposed by the Masters than to those proposed by the District Court. Furthermore, under the Masters proposal three school districts would have been more than 50% white, and no school districts would have been more than 50% black, while under the District Court's plan there are still three districts more than 50% white and, in addition, two districts are more than 50% black.

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ENROLLMENTS

	Master's Plan			District Court Plan */			Actual Attendance under Court Plan (2-6-76)		
	White	Black	Other	White	Black	Other	White	Black	Other
Brighton	49%	31%	20%	43%	35%	22%	35%	38%	27%
Jamaica Plain	38%	37%	25%	43%	42%	15%	34%	47%	19%
Hyde Park	48%	48%	4%	61%	36%	3%	48%	50%	2%
West Roxbury	77%	17%	6%	55%	41%	4%	44%	52%	4%
Dorchester	49%	41%	10%						
Burke	29%	50%	21%						
	38%	46%	16%	43%	50%	7%	34%	59%	7%
South Boston	58%	33%	9%	51%	35%	14%	51%	36%	13%
Madison Park	37%	46%	17%	39%	36%	25%	32%	42%	26%
East Boston	95%	3%	2%	95%	3%	2%	94%	4%	2%
Citywide	48%	36%	16%	**/	**/	**/	52%	36%	12%
TOTAL	50%	36%	14%	51%	38%	11%	45%	43%	12%

*/ All the statistics in this portion of the table are based upon school population resident in the district. The District Court made no adjustment to compensate for students resident in the district but attending city-wide schools.

**/ The court proposed to have the city-wide district reflect city-wide school racial percentages but did not tabulate precise racial data for this district.

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Moreover, as demonstrated by the following table, the District Court's final plan may actually have achieved less desegregation than did the Masters' plan with respect to individual schools. It is certainly clear that the Court's plan was not a significant improvement over the Masters' plan in this regard. But although there was little difference in the amount of the desegregation accomplished by the Masters' and District Court plans, the social and economic costs borne by the people of Boston as a result of the District Court's refusal to adopt the Masters' proposal have been great.

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BOSTON SCHOOL SYSTEM: COMPARISON BETWEEN PRE-DESEGREGATION, MASTERS' PLAN, AND DISTRICT COURT ACTUAL RACIAL COMPOSITION BY SCHOOL

PRE-DESEGREGATION PLAN*/	MASTERS' PLAN**	DISTRICT COURT PLAN***/
SYSTEM-WIDE		
School population 61% white --32% black--7% other minority	School population 50% white --36% black--14% other minority	School population 45% white--43% black--12% other minority
84% of white students in schools more than 80% white	14% of white students in schools more than 80% white (mainly East Boston)	12% of white students in schools more than 80% white (mainly East Boston)
62% of black students in schools more than 70% black	No black students in schools more than 70% black	1% of black students in schools more than 70% black
HIGH SCHOOLS		
23 total high schools	22 total high schools	19 total high schools
2 high schools within 10% of system's racial distribution	16 high schools within 10% of system's racial distribution	7 high schools within 10% of system's racial distribution
6 high schools over 90% white	1 high school over 90% white	1 high school over 90% white
11 high schools over 85% white	1 high school over 85% white	1 high school over 85% white
2 high schools over 90% black	No high school over 90% black	No high school over 90% black
4 high schools over 50% black	No high school over 50% black	1 high school over 50% black
JUNIOR HIGH AND MIDDLE SCHOOLS		
19 total schools	20 total schools	28 total schools
4 schools over 90% black	No schools over 90% black	No schools over 90% black
7 schools over 60% black	No schools over 60% black	3 schools over 60% black
8 schools over 80% white	1 school over 80% white	4 schools over 80% white
2 schools within 20% of the black citywide percentages	17 schools within 20% of the black citywide percentages	23 schools within 20% of the black citywide percentages
ELEMENTARY SCHOOLS		
140 elementary schools	115 elementary schools	117 elementary schools
62 schools under 5% black	9 schools under 5% black (all in East Boston)	6 schools under 5% black (all in East Boston)
32 schools over 85% black	No schools over 85% black	1 school over 85% black
5 schools with racial composition within 10% of black citywide percentages	73 schools with racial composition within 10% of black citywide percentages	57 schools with racial composition within 10% of black citywide percentages
Data on number of schools with racial compositions within 15% of citywide percentages unavailable	83 schools within 15% of black citywide percentages	71 schools within 15% of black citywide percentages

*/ Based on the data for the 1971-72 school year set forth by the District Court in its liability opinion. 379 F. Supp. at 424.

**/ Based on the data set forth in the Masters' plan for the 1975-76 school year. (M. R., Appendix E).

***/ Based on the data set forth in Boston Public Schools, Actual Enrollments by Race, School and Level as of February 6, 1976 (submitted by the School Committee to the District Court on February 9, 1976).

Community resentment toward the replacement of the Masters' plan with the District Court plan has heightened social and racial problems in the City and resulted in a decline in enrollment in the schools.

BOSTON SCHOOL DISTRICT—TOTAL ENROLLMENT

	Total	White	Black	Other
1974-75[17]	72,249	36,735 (51%)	27,225 (38%)	8,289 (11%)
1975-76[18]	67,383	30,629 (45%)	28,706 (43%)	8,048 (12%)

As shown by this table, the school system has lost nearly 5,000 students, approximately 8% of its total enrollment, since the imposition of the District Court plan. The white school population has dropped by over 6,000. The school system has changed from a majority white to a majority nonwhite system in one year.

Moreover, despite the decline in enrollment, the School Committee's budget has increased by 20% from $126.6 million to $154.6 million during the past year. (See table, page 11, *supra*). A very large part of this increase is due to the expenses of the desegregation plan.

10. *The Court of Appeals Affirmed the District Court Decision.* Although the court issued a lengthy opinion, its treatment of the important issues raised by this petition was cursory. With regard to the redrawing of the district lines, the Court of Appeals indicated only that the effect of the District Court's alterations in the Masters' plan was unclear in light of the new data developed by the

[17] These are the April 10, 1975, statistics referred to by the District Court in its opinion. (App. 74a).

[18] These statistics are taken from Boston Public Schools, Actual Enrollments by Race, School, and Level as of February 6, 1976 (submitted by the School Committee to the District Court on February 9, 1976).

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School Committee. (App. 15a, n.14). The Court of Appeals went on to hold that, even if the District Court plan did bus 6,000 additional students, the District Court did not abuse its discretion by requiring that additional busing. (App. 18a-20a).

The Court of Appeals next held that resegregation, white flight and community acceptability are not "practicalities" which may be considered in formulating "the greatest possible degree of actual desegregation" as required by this Court's decision in *Davis* v. *Board of School Commissioners,* 402 U.S. 33, 37 (1971). (App. 19a, 29a-32a). In making this decision, the court did not consider actual statistics of the sort which have been reprinted in this petition at pages 23 and 25, *supra,* nor did the court distinguish the factors which may be considered in framing a constitutionally-required remedy from those which may appropriately be considered in choosing between two constitutionally sufficient remedies.

The Court of Appeals next dismissed any problems of cost by asserting that "virtually the entire expense of any incremental busing is fundable by the State Board of Education." (App. 19a). (In fact, it appears that the State Board is only willing to reimburse Boston for less than 60% of the cost of busing incurred under the desegregation plan, if the legislature makes the funds available.) The court did not consider any other costs imposed by the plan.

Finally, the court rejected the Mayor's contention that the Equal Educational Opportunities Act of 1974 precluded the District Court from adopting a plan which required more busing of school children than necessary to achieve

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constitutionally satisfactory school desegregation. The court held that, once the District Court had found that some busing was necessary, the Act did not limit the District Court's discretion to order any amount of busing it chose. (App. 15a-19a). The Court of Appeals reached this result despite the evident contrary meaning of the statutory language and despite the court's recognition that its holding rendered the Act meaningless.[19]

REASONS FOR GRANTING THE WRIT

1. This case raises, for the first time in this Court, the issue whether courts are required by law to ignore such factors as the amount of busing, cost, community acceptance, and potential for resegregation in choosing between clearly satisfactory but different plans to remedy urban school segregation. The resolution of this issue is important, not only to the City of Boston, but also to the prospects for achieving meaningful desegregation elsewhere and for avoiding excessive and needless social and financial burdens on the nation's hard-pressed cities.

As the facts set forth above demonstrate, there was very little difference in potential for desegregation between the Masters' plan and the District Court plan. Neither of the courts below found that the Masters' plan would have been constitutionally insufficient to remedy the segregation imposed by the Boston School Committee, and the Court of

[19] "Since this argument [that the Act precluded the District Court from ordering more busing than constitutionally required] concerns the district court's discretion in determining the adequacy of the remedy, and therefore gains nothing from the Act which leaves that discretion unaffected, it must stand or fall upon those traditional principles of equity which would govern this issue even were the Act not in existence." (App. 17a-18a).

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Appeals recognized that it could reach no such conclusion.[20] Indeed, many circuit courts have approved school desegregation plans which resulted in significantly less desegregation than did the Plan proposed by the Masters.[21] Thus the District Court had before it two plans—the Masters' and its own, described in detail earlier—either of which would have eliminated the vestiges of state imposed segregation "root and branch" as required by this Court's decisions. *Keyes* v. *School District No. 1,* 413 U.S. 189, 200 (1973); *Davis* v. *Board of School Commissioners,* 402 U.S. 33, 37 (1971); *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 15 (1971).

Nevertheless, the courts below refused to consider any factors relating to comparative costs, busing requirements, community acceptance, or possible resegregation of the

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[20] The District Court explicitly refused to consider this issue, although the judge did state that in choosing between the Masters' plan and the District Court plan "constitutional considerations [were] only secondary. . . ." Transcript of April 15, 1975, hearing pp. 7-8, 32. The Court of Appeals at least posed, although it did not answer, the question whether the District Court could reasonably have found that whatever additional desegregation would be accomplished by its plan was constitutionally required. (App. 19a). The Court of Appeals concluded that the differences between the Masters' and District Court plans were "slight" but "not trivial." The court then stated that "the concept of minimum [constitutionally required desegregation] cannot be identified with precision" and indicated that it was not possible to determine if any differences between the Masters' plan and the District Court plan were of constitutional significance. (App. 20a).

[21] *E.g., Northcross* v. *Board of Education,* 489 F.2d 15, 16-17 (6th Cir. 1973), *cert. denied,* 416 U.S. 962 (1974) (Memphis); *Goss* v. *Board of Education,* 482 F.2d 1044 (6th Cir. 1973), *cert. denied,* 414 U.S. 1171 (1974) (Knoxville); *Ross* v. *Eckels,* 434 F.2d 1140, 1147-47 (5th Cir. 1970), *cert. denied,* 402 U.S. 953 (1971) (Houston); *Pate* v. *Dade County School Board,* 434 F.2d 1151, 1154 (5th Cir. 1970), *cert. denied,* 402 U.S. 953 (1971) (Miami); *Carr* v. *Montgomery County Board of Education,* 377 F. Supp. 1123 (M.D. Ala. 1974), *aff'd per curiam,* 511 F.2d 1374, *reh. denied,* 511 F.2d 1390 (5th Cir. 1975) (Montgomery).

Boston schools in choosing between the Masters' and the District Court plans. In support of their conclusion, the courts below relied on this Court's decisions which have held that factors such as community acceptability, cost, and the like cannot be used as reasons for achieving less than a complete uprooting of a dual school system. *E.g., United States* v. *Scotland Neck City Board of Education,* 407 U.S. 484, 490-91 (1972); *Monroe* v. *Board of Commissioners,* 391 U.S. 450, 459 (1968). But that, of course, was not the issue in the present case. Here there is no attempt to avoid constitutionally mandated desegregation. Rather, the question is simply if such factors as the extent of busing, cost, community acceptance, and resegregation can and should be considered by a court in determining which of two constitutionally satisfactory but differing plans should be adopted.

The Mayor submits that such factors must be considered in choosing between constitutionally adequate alternatives if courts are to take "into account the practicalities of the situation" in adopting "realistic" and "effective" school desegregation plans. *Davis* v. *Board of School Commissioners, supra,* 402 U.S. at 37; *Swann* v. *Charlotte-Mecklenburg Board of Education, supra,* 402 U.S. at 31. For example, this Court has previously recognized that it is appropriate to consider resegregation or "white flight" where that is relevant to preserving a desegregated school system. *Wright* v. *Council of the City of Emporia,* 407 U.S. 451, 464-65, 470 (1972); *Milliken* v. *Bradley,* 418 U.S. 717, 801-02 (1974) (Marshall, J., dissenting). The lower courts have reached the same conclusion. *Spangler* v. *Pasadena Board of Education,* 519 F.2d 430, 438 (9th Cir.), *cert. granted,* 96 S. Ct. 355 (1975); *Johnson* v. *San Francisco Unified School District,* 339 F. Supp. 1315, 1321-22 (N.D.

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Cal. 1971), *vacated on other grounds,* 500 F.2d 349 (9th Cir. 1975). *See also Higgins* v. *Board of Education,* 508 F.2d 779, 794 (6th Cir. 1974).

This Court's command in *Swann* and *Davis* that school plans accomplish effective desegregation in light of the practicalities of the situation is derived from the traditional equitable principle that courts must weigh the benefits and harms to the parties and the public interest in choosing from among alternative adequate forms of relief. *Swann* v. *Charlotte-Mecklenburg Board of Education, supra,* 402 U.S. at 30-31; *Brown* v. *Board of Education II,* 349 U.S. 294, 300 (1955). Moreover, this Court has repeatedly emphasized that in the exercise of remedial powers in cases such as this, the courts must take particular care in view of the "delicate issues" of the relationship of the federal courts to state and local government. *Rizzo* v. *Goode,* 44 U.S.L.W. 4095, 4101 (January 21, 1976); *Mayor* v. *Educational Equality League,* 415 U.S. 605, 615 (1974).

As noted previously, the Masters had taken particular care to maximize desegregation and educational benefits and, insofar as consistent with these objectives, to minimize community disruption and busing. But, as was also described above, the courts below believed that they could not consider the amount of busing, cost, community acceptance, or resegregation as "practicalities."

The decision of the courts below in this regard is inconsistent with the decisions of this Court and contrary to common sense. As the District Court's own experts indicated in the proceedings below, courts cannot blind themselves to everyday realities in choosing between two perfectly permissible and constitutionally adequate remedies. School systems work only to the extent that students and

parents cooperate in making them work. Desegregation is meaningful only so long as students of all races remain in the schools and only so long as they find there a quality education for all. As described earlier, Boston is afflicted with many of the urban financial and social problems which are so readily exacerbated when such factors are ignored.

While these considerations are irrelevant in determining if a particular remedy passes constitutional muster, they are critical to a court decision to choose between two adequate, but different, plans. The courts below, under a misconception of the requirements that this Court has set forth in *Scotland Neck, Monroe,* and *Swann, supra,* improperly refused to consider the extent of busing, cost, community acceptance or potential for resegregation in determining whether to adopt the Masters' plan or the plan drawn up by Section 5 of the District Court.

2. This Court has never interpreted the Equal Educational Opportunities Act of 1974, 20 U.S.C. §§ 1701 *et seq.* In view of the Act's important social judgments, its passage under the specific authority granted Congress by Section 5 of the Fourteenth Amendment, and its evisceration by the decisions below, consideration of the Act by this Court is appropriate.

In *Swann* v. *Charlotte-Mecklenburg Board of Education, supra,* 402 U.S. at 14, this Court found that remedies for school segregation have been "imperfect" and "incomplete." The Congress made the same finding in enacting the Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1702 (a)(6). In passing the Act, Congress, without attempting to diminish the authority of the courts to remedy violations of the Fifth and Fourteenth Amendments of the Constitution, undertook to "specify appropriate remedies for

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the orderly removal of the vestiges of the dual school system" and to establish a priority for the imposition of such remedies. 20 U.S.C. §§ 1701(b) and 1713. The priorities for desegregation remedies under the Act are as follows:

(a) Assigning students to the closest school to their place of residence;

(b) Majority to minority transfers;

(c) Revisions of attendance zones to require assignments to the second closest school to the student's place of residence;

(d) Construction of new or closing of old schools;

(e) Establishment of magnet schools;

(f) Development and implementation of any other plan, including busing. 20 U.S.C. § 1713.

Congress did not attempt to prohibit busing of students, but it did conclude that busing was the least educationally satisfactory remedy and should be used only where other remedies for *de jure* segregation did not work. 20 U.S.C. § 1755. Finally, Congress specifically prohibited the imposition of remedies more drastic than necessary to correct segregation. 20 U.S.C. § 1712. The Act thus seeks to limit the imposition of busing to the minimum necessary to achieve a constitutional remedy.

The courts below held that the Act did not in any way limit the District Court's discretion to impose any remedy it preferred once it had found that some busing was necessary. This renders the Act meaningless, as the Court of Appeals explicitly recognized. (App. 18a-19a). In the absence of the Act, it was arguable that the District Court had

discretion, after a consideration of all relevant factors, to adopt a plan which required more busing even though a plan using other techniques would have required less busing. The Equal Educational Opportunities Act specifically removes that discretion. See 20 U.S.C. § 1712. In the present case, where neither the District Court nor the Court of Appeals found that the Masters' plan, with less busing, was constitutionally inadequate,[22] the Equal Educational Opportunities Act precluded the District Court from adopting a plan which required busing of 6,000 additional children.

The Act fills a grave need for a satisfactory legal framework to enable courts to define proper limits for busing. Those who support busing suggest that busing is necessary as a remedy for segregation and will result ultimately in better education and better social conditions for all students. Those who oppose busing point out that there is increasing evidence that it disrupts educational systems, interferes with the provision of quality schools, and may precipitate resegregation. Both theories have the support of eminent educators and sociologists, but both theories are lacking in definitive proof. Under these circumstances, it is perfectly appropriate for Congress to make a social judgment in establishing the legal framework for busing.

Congress therefore made an entirely legitimate judgment when it considered the possible dangers to important individual and social interests and adopted the Equal Educational Opportunities Act of 1974. Congress determined that, because of these dangers, in choosing between satisfactory alternative plans to remedy the ills of racial segregation in the public schools, the courts should choose the plan which requires least busing. Section 5 of the Fourteenth Amend-

[22] See the discussion at page 29, n.20, *supra*.

ment specifically authorizes Congress to make judgments of this type. Under these circumstances, "it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Missouri Kansas and Texas R. Co.* v. *May*, 194 U.S. 267, 270 (1904) (Holmes, J.). See also *United States* v. *Richardson*, 418 U.S. 166, 189 (1974) (Powell, J., concurring). The courts below should not be permitted to ignore the important Congressional judgment embodied in the Act.

CONCLUSION

The constitutional and statutory standards which guide lower courts in the fashioning of urban school desegregation remedies are in urgent need of clarification by this Court. The issues raised by this petition concerning such standards are central to the hope for workable, long-lasting desegregation and continued viability of the major cities. These issues are therefore of major importance not merely to Boston but to the urban areas across the country. For the reasons set forth above, this Petition for Certiorari should be granted.

Respectfully submitted,

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April, 1976

APPENDICES

A. Opinion of the Court of Appeals

United States Court of Appeals
For the First Circuit

Nos. 75-1184, 75-1194,
Nos. 75-1197, 75-1212

TALLULAH MORGAN, et al.,

PLAINTIFFS, APPELLEES,

v.

JOHN J. KERRIGAN, et al.,

DEFENDANTS, APPELLANTS,

BOSTON HOME AND SCHOOL ASSOCIATION,

DEFENDANT-INTERVENOR, APPELLANT,

KEVIN H. WHITE, etc., et al.,

DEFENDANTS, APPELLANTS.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
(HON. W. ARTHUR GARRITY, JR., *U.S. District Judge*)

Before COFFIN, *Chief Judge*,
McENTEE and CAMPBELL, *Circuit Judges*.

Matthew T. Connolly, with whom *Francis J. DiMento, James J. Sullivan, Jr., Philip T. Tierney*, and *DiMento & Sullivan* were on brief, for John J. Kerrigan, et al.

Kevin F. Moloney for Kevin White et al.

Thayer Fremont-Smith with whom *Owen S. Walker, Choate, Hall & Stewart*, and *Philip B. Kurland* were on brief, for Boston Home and School Association.

John Leubsdorf, with whom *Laurence S. Fordham, Foley, Hoag & Eliot, J. Harold Flannery, Rudolph F. Pierce, Keating, Perretta & Pierce, Thomas M. Simmons, Robert Pressman, Eric E. Van Loon, Nathaniel R. Jones*, and *Roger I. Abrams* were on brief, for Tallulah Morgan, et al.

Timothy J.W. Wise, Assistant Attorney General, with whom *Francis X. Bellotti*, Attorney General, *Margot Botsford*, Assistant Attorney General, and *Sandra L. Lynch*, General Counsel, State Board of Education were on brief, for State defendants.

Richard Hiller, with whom *Jack John Olivero*, *Herbert Teitelbaum*, *Michael Haroz*, *Jean Mirer*, and *Pamela Taylor* were on brief, for El Comite De Padres Pro Defensa De Education Bilingue.

January 14, 1976

COFFIN, *Chief Judge*. These appeals present varied challenges to orders of the district court implementing a plan of desegregation for the public schools of Boston. The consolidated cases concern the remedy phase of litigation initiated by plaintiffs-appellees, representing a class of all black public school students and their parents, against, principally, the Boston School Committee and the Superintendent of Boston Public Schools. The liability phase came to an end in 1974 with a district court finding of substantial segregation in the entire school system intentionally brought about and maintained by official action over the years. *Morgan* v. *Hennigan*, 379 F. Supp. 410 (D. Mass. 1974).[1] We affirmed, *Morgan* v. *Kerrigan*, 509 F.2d 580 (1st Cir. 1974), and the Supreme Court denied certiorari, 421 U.S. 963 (1975).

While the liability issues were being considered on appeal, the district court, after its decision on June 21, 1974, began its exploration of appropriate remedies. The period from June, 1974, to May, 1975, was occupied with the addition of parties to the litigation,[2] hearings as to the nature, scope and

[1] The court specifically found that segregative policies had operated in the following respects: in the utilization of facilities and planning of new structures; in drawing and redrawing school district lines; in developing feeder patterns determining enrollments at specific high schools; in the open enrollment policy, the subsequent controlled transfer policy and the exceptions thereto; in the hiring, promotion, and assignment of black faculty and staff. Because of the operation of the second presumption in *Keyes* v. *School District No. 1*, 413 U.S. 189, 208 (1973), which it found had not been rebutted, the court also held that official intentional segregation infected the elite, citywide examination schools and vocational schools and programs.

[2] The original parties, in addition to the plaintiffs and the Boston defendants, included the State Board of Education (nominal defendants, although supporting the court's order and appellee here). Subsequently allowed to intervene were the Boston Teachers Union, the Boston Association of School Administrators and Headmasters, the Boston Home and School Association, and El Comite De Padres Pro Defense De La Education Bilingue. The Commissioners of the

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objectives of a plan, submission and criticism of various plans, consideration of all proposals and preparation of a plan by a panel of masters, and, finally, the issuance of a revised plan by the district court on May 10, 1975, followed by a Memorandum Decision and Remedial Order. *Morgan* v. *Kerrigan*, 401 F. Supp. 216 (D.Mass. 1975). On June 17, 1975, we denied appellants' motion for a stay pending appeal, *Morgan* v. *Kerrigan*, 523 F.2d 917 (1975), but devised a consolidated and expedited briefing schedule, in which all parties have faithfully cooperated. During the summer of 1975 the court, counsel, school officials, teachers, parent organizations, and federal, state, and city agencies and officials worked intensively to prepare for the September school opening in compliance with the district court's order, commonly referred to as Phase II.[3] The schools are now functioning in accordance with the court's plan and orders.

The issues to be considered here are both procedural and substantive and require some further background of events. After hearings during the summer and early fall of 1974, the district court, on October 31, 1974, entered an order establishing guidelines[4] and date (December 16) for a plan of desegregation to be filed by the School Committee. Such a plan was prepared by the staff but, on the deadline date,

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Public Facilities Commission, the Director of the Public Facilities Department, and the Mayor of Boston (hereinafter, collectively, the Mayor) were joined as parties defendant.

[3] Following the determination on liability in 1974, the district court ordered the implementation of a plan devised by the state for the 1974-1975 school year. This plan was commonly referred to as Phase I. *See* 379 F. Supp. at 483.

[4] The order provided that the "starting point" for its desegregation decree would be that "the racial composition of the student body of every school should generally reflect the ratios of white and black students enrolled at that grade level of schools, elementary, intermediate, and secondary, throughout the system."

the School Committee voted not to submit it.[5] It was, however, filed by the Committee's counsel. This plan called for six districts, with varying learning approaches available within each district, and "magnet" or special purpose high schools, but left with parents the choice of schools for their children.

On January 20, 1975, plaintiffs submitted a plan, accepting the six districts identified in the staff plan of December 16, 1974, but proposing a mandatory allocation of students among the schools to achieve minority enrollments that were neither too small (e.g., a minimum of 29.4 percent in elementary schools) nor too large (e.g., a maximum of 60.6 percent in elementary schools).

Also on January 20, 1975, the Boston Home and School Association (Association) filed a plan which was based on the theory that segregation in certain schools was the result of "existing residential separateness" and a policy of neighborhood school assignments, rather than of any official actions of the School Committee. To support its approach, the Association offered evidence of demographic patterns, which the district court refused to accept on the grounds that the evidence was irrevelant at the remedy stage of the case and that the issue raised by the offer had been litigated and finally decided in the liability phase of these proceedings. The court's refusal to consider the Association's plan is not in issue, but the Association's contention that the court should reopen the proceedings to consider, for purposes of tailoring remedies, the impact of demographic conditions on particular schools is one of the principal issues before us.

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[5] This action by the School Committee led to contempt proceedings and a finding by the district court that three members were in continuing contempt of the order of October 31, 1974. This court denied a stay pending appeal of the civil contempt order. *Morgan* v. *Kerrigan*, 509 F.2d 618 (1st Cir. 1975). Subsequently, the district court found that they had purged themselves, and, ultimately, on January 27, 1975, the School Committee did submit a plan, different from the staff proposal filed by counsel.

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The School Committee's plan, finally submitted on January 27, 1975, *see* note 5 *supra*, also kept the six districts or zones, and allowed parents several options, ranging from electing to have their child remain in a racially mixed school, to choosing a citywide or zoned magnet school, to *any* school within the zone. Should the school chosen by the parents be dominantly black or white, the desegregative remedy would be a once-a-week (for elementary schools) or a once-every-two-week (for middle level schools) visit by paired black and white schools to a "third site" resource center for training and experience in race relations.

With these three plans on the table, the court appointed two experts to assist in evaluating plans and a panel of four masters to consider the plans — commencing with the School Committee's January 27 plan — hold hearings, and "make recommendations to the Court".[6] The masters held hearings for over two weeks, and, after hearing argument addressed to a draft report, issued their final report on March 31, 1975. The masters found the School Committee plan inadequate, in large part because of its reliance on parental free choice; rejected plaintiffs' plan as being educationally deficient, unwieldly and arbitrary; rejected the December 16 plan as being vague and unduly burdensome to minorities; and proposed a ten district system, one being a citywide district with magnet schools and specially appealing programs, with each of the other nine districts and some of the magnet schools being paired with specific colleges, labor and busi-

[6] An objection was made by the School Committee to the naming of two of the masters on the ground that their association with the Harvard University Graduate School of Education constituted a disqualifying interest in the Harvard Center for Law and Education, which presently or formerly employed three attorneys representing plaintiffs. The School Committee also objected to the appointments of a third master and one expert because each had in the past supported the NAACP, which had provided financial assistance and counsel to the plaintiffs. The issue arising from the overruling of these objections will be dealt with later in this opinion. So also will be a further objection of the School Committee to the court's order awarding compensation to the masters.

ness organizations for assistance in program enrichment. Mandatory busing was estimated by the masters to affect 10,700 to 14,900 students.

The court then called for hearings on objections to the masters' report, which commenced on April 10. In the meantime, the court had called for updated enrollment data from the School Committee. The court issued its Draft Revision of the Masters' Report on April 17, heard comments on April 18, and issued its desegregation plan on May 10. Its plan reduced the number of districts from the ten recommended by the masters to nine, redrew district lines, and reflected — on the basis of the new data — less racial disparity generally in school assignments than did the masters' plan. The plan not only precisely set forth the new districts but called for changes in the school system's administrative hierarchy, and established a system of community participation in district and citywide councils. The mandatory busing estimated by the court would affect 21,000 students. During this time of accelerated activity, the court also appointed an ad hoc committee of three attorneys to assist in obtaining support from colleges and universities, and ordered that school personnel meet and confer with personnel from the designated college or university. Late in June the court authorized the court-appointed experts to resolve some remaining issues relating to facilities utilization, program allocation, and enrollment limits. Each of these actions by the court has been challenged, as well as the court's plan itself.

This skeletal recitation of chronology masks a year of increasingly intensive activity in collecting and updating data, preparing, evaluating, and amending plans embracing a wide variety of approaches, and, finally, devising procedures and taking action to put into effect a plan calling for a dramatically different educational system affecting some 80,000 students. The pressures of time, the problems of developing

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reliable data, the clash among radically differing approaches, the resistance of the School Committee, the sheer numbers of parents, students, teachers, and administrators to be informed and oriented were all part of the massive problems of implementation.

While we appreciate the labors that have taken place by all concerned, we also appreciate the necessity of giving the most careful consideration to the issues before us. Some are of large significance. Some are of little moment. For purposes of clarity, we summarize them, not necessarily in terms of importance, but in terms of their breadth and specificity.

A. *Broad challenges to the court's plan.*

1. The School Committee contends that its free choice-third site plan was constitutionally sufficient and should have been adopted.

2. The Mayor contends that, the masters' plan being constitutionally sufficient, the Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1701 *et seq.*, deprived the court of power to issue its own plan.

3. The Association contends that the court's plan was erroneous because the court did not confine the remedy to eliminating the demonstrable effects of the School Committee's unlawful actions.

4. The Association, the Mayor, and by implication, the School Committee, contend that the court's plan is defective in not having given weight to the impact of the departure of white students to other schools outside the Boston school system.

B. *Detailed challenges to the court's plan.*

1. The School Committee and the Association contend that the court erred in a mechanical resort to ratios. The Mayor and the Association object particularly to the use of ratios in effecting minority assignments to the high standard examination schools.

2. The School Committee challenges the appointment of three masters and one expert and objects to the compensation of all four masters.

3. The School Committee objects to the court's encroachment on its functions:

a. In specifying magnet programs;

b. In requiring the participation of colleges and universities;

c. In requiring the systematic involvement of a City-wide Coordinating Council and Community District Advisory Councils;

d. In requiring the hiring of additional supervisory personnel; and

e. In giving supervisory power to court-appointed experts.

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A. *Broad challenges to the court's plan.*

Four sweeping criticisms have been leveled at the court's plan. The simplest is that the School Committee's plan passed constitutional muster and the court could not justifiably require more. A similar argument, taking another point of reference, is that since the masters' plan was constitutionally sufficient, the court could not, by reason of the Equal Educational Opportunities Act of 1974, require more. The remaining two broad scale attacks do not assert a barrier to going beyond any other plan but rely on the necessity for making further inquiries into remedial issues before a final plan is implemented. One type of prerequisite inquiry would be to ascertain the prior impact of official segregative action so that the remedy could be restricted to removing that impact. The other asserted prerequisite would be an inquiry into the likelihood of "white flight" so that a remedy may be tailored which, by minimizing such flight, would assure a maximum achievable co-education among the races.

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1. *Sufficiency of the School Committee's Plan.*

Upon a finding that a school system has been operated in contravention of the equal protection clause of the Fourteenth Amendment to the constitution, the burden falls upon the local school authorities to present a plan of action to the district court to remedy the violations. *Swann* v. *Charlotte-Mecklenberg Board of Education*, 402 U.S. 1, 16 (1971). Only on the default of the School Committee to proffer an acceptable remedial plan is the district court empowered to fashion a remedy adequate to produce a unitary school system. *Id.* The threshold question, then, in reviewing the district court's action, is whether the rejection of the School Committee's plan of January 27 was proper.

In determining the acceptability of a proposed plan, the district court must assess the effectiveness of the plan in achieving desegregation. *Green* v. *County School Board*, 391 U.S. 430, 439 (1968). The district court, applying this standard, rejected the School Committee plan stating that it "presented no more than a hope for desegregation in Boston". 401 F. Supp. at 229. On review, we conclude not only that the district court's assessment of the School Committee plan was proper, but that if the district court had accepted the January 27 plan, we would have been constrained to reverse. *See Keyes* v. *School District No. 1*, 521 F.2d 465 (10th Cir. 1975); *Jackson* v. *Marvell School District No. 22*, 416 F.2d 380 (5th Cir. 1969).

The plan submitted by the School Committee was, in summary, a freedom of choice plan supplemented by magnet schools and third site resource centers. The school assignment process was to be based upon a series of options available to the students and their parents. Starting with the option to remain in the school attended in the previous year if it had been desegregated under Phase I, the student could choose in succeeding options to attend a citywide magnet

school, a zonal magnet school, a school in which his race is in the minority, and finally, any school in the zone. At the end of this five step, seven week process a review committee would determine a course of action to deal with over-subscribed schools.[7] In the event that schools remained "racially isolated", defined by the school department as more than a 15 percent deviation from the racial ratio for that level in the zone, the plan provided for mandatory student participation in resource center activities. The resource center proposal called for integrated educational experiences at a third site, once a week for elementary students, once every two weeks for middle school students and a human relations course for high school students. The entire plan rested on student and parental choice to desegregate the schools.

It is well established that freedom of choice plans to desegregate school systems are not per se unconstitutional. *Green, supra.* In order for such a plan to be constitutionally acceptable, however, it must promise to be as effective in achieving a unitary desegregated system as any alternative and feasible plan. *Id.* Freedom of choice has a long history of failure in achieving desegregation both in the south, *Swann, supra; Monroe* v. *Board of Commissioners,* 391 U.S. 450 (1968); *Green, supra,*[8] and in other parts of the country,

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[7] According to this plan, various options were to be considered to deal with oversubscribed schools. These include the use of temporary classrooms, and extension of the school year to increase capacity. The use of temporary classrooms to enable white schools to operate in excess of their capacity was found to be one of the bases of liability in this action. *Morgan* v. *Hennigan, supra,* 379 F. Supp. at 427-28.

[8] *Accord, Bivins* v. *Bibb County Board of Education,* 424 F.2d 97 (5th Cir. 1970); *United States* v. *Board of Education of Baldwin County,* 423 F.2d 1013 (5th Cir. 1970); *United States* v. *Hinds County School Board,* 417 F.2d 852 (5th Cir. 1969); *United States* v. *Jefferson County Board of Education,* 417 F.2d 834 (5th Cir. 1969); *Hall* v. *St. Helena Parish School Board,* 417 F.2d 801 (5th Cir. 1969); *Jackson* v. *Marvell School District No. 22* ,416 F.2d 380 (8th Cir. 1969); *United States* v. *Lovett,* 416 F.2d 386 (8th Cir. 1969); *Anthony* v. *Marshall County Board of Education,* 409 F.2d 1287 (5th Cir. 1962); *United States* v. *Greenwood Municipal Separate School District,* 406 F.2d 1086 (5th Cir. 1969).

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Kelly v. *Guinn*, 456 F.2d 100 (9th Cir. 1972) (Las Vegas); *Spangler* v. *Pasadena City Board of Education*, 375 F. Supp. 1304 (C.D. Cal. 1974). To be sure, it may be argued that voluntary plans were less promising in the South than in the North, as segregated dual systems were deeply entrenched there, having had an express legal basis. Yet as the district court's findings indicate, Boston had gone far in the creation of a de jure dual system. Boston, moreover, for ten years had a policy of open enrollment, followed by a controlled transfer policy riddled with exceptions. In an earlier stage of the present case the district court found that this policy served to increase, rather than decrease, segregation in the school system. *Morgan* v. *Hennigan*, *supra*, 379 F. Supp. at 449-59.

The School Committtee contends that its plan, although founded on freedom of choice, held promise to achieve desegregation due to the heavy reliance on magnet schools and alternative program schools — some fifty in number. Like freedom of choice, the use of magnet schools to achieve voluntary desegregation has failed elsewhere, *Bradley* v. *Milliken*, 484 F.2d 215, 243 (6th Cir. 1974), *rev'd on other grounds*, 418 U.S. 717 (1974); *Kelly* v. *Guinn*, *supra*; *Spangler* v. *Pasadena City Board of Education*, *supra*; *Dowell* v. *Board of Education*, 338 F. Supp. 1256, 1264 (W.D. Okla. 1972). *Compare Hart* v. *Community School Board*, 512 F.2d 37, 54-55 (2d Cir. 1975). Although Boston has had experience with one school which offered a specialized program and achieved a racially mixed student body,[9] we must agree with the district court that schools offering programmatic alternatives, while a useful supplement to an otherwise adequate desegregation plan, could not realistically sustain the burden

[9] The Trotter School was designed to offer cultural enrichment programs for children from AFDC families. White students residing in AFDC homes from outside the city of Boston made up part of the student body. 379 F. Supp. at 430.

of achieving desegregation of the Boston city schools.[10]

Finally, the School Committee plan to remedy "racial isolation" with part-time integregated resource centers added nothing to the effectiveness of the overall plan. The objective sought to be achieved in a remedial plan is desegregation, not interracial experience or racial balance. *Milliken* v. *Bradley*, 418 U.S. 717 (1974). Accordingly, similar part-time programs have been categorically rejected elsewhere, *Keyes* v. *School District No. 1, supra*, 521 F.2d at 477-79; *Arvizu* v. *Waco Independent School District*, 495 F.2d 499, 503 (5th Cir. 1974); *United States* v. *Texas Education Agency*, 467 F.2d 848, 859 (5th Cir. 1972), and must be rejected here.

Against this historical background which promised failure for every feature of the School Committee plan, it is inconceivable that anyone, the School Committee members or the court, could believe that the plan would be effective in eliminating and guarding against officially imposed segregation in Boston.[11] The district court, therefore, was clearly correct in declaring the School Committee in default of its obligation to present a constitutionally adequate plan. It was the district court's unquestionable duty to utilize all the re-

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[10] The masters found:

"The magnet concept as devised by the Committee is unrealistic and unworkable. Magnet programs could assist desegregation if they satisfied certain conditions. They must be limited in number, and they must be carefully placed, so that the effect of the applications they attract is to promote desegregaion. The Committee Plan, which proposes the introduction of many magnet programs, satisfies none of these conditions, and could not possibly be put into operation by September, 1975."

[11] Comments of a member, and of the then Chairman, are revealing:

"The plan is 'pie in the sky.' It is a contradiction, it is impossible. All of us would love to see a voluntary desegregation system put into effect. It is not a practical reality. Of course I will vote for this."

"I would never vote for a plan that involved the busing of school children. It is unfortunate that is the way our society exists . . . but the only way you are going to desegregate city schools is through forced busing."

The only member of the School Committee to refuse to vote for the plan stated:

"I agree that it would be an ideal solution and therefore will not vote against it, but I will vote 'present.' I believe we should have our votes consistent with what we feel is a reality." Remarks of Member Sullivan, Emergency Meeting of the Boston School Comm., January 7, 1975.

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sources available to it as to fashion expeditiously a remedy that realistically would produce a unitary school system. *Swann, supra.*

2. *The Constitutional Adequacy of the Masters' Plan and the Applicability of the Equal Educational Opportunities Act of 1974.*

The Mayor's principal attack on the court's plan, essentially joined in by the Association, is that, since the masters' plan was constitutionally sufficient, the court was without power to require more busing than that contemplated by the masters. The source of this alleged limitation is the Equal Educational Opportunities Act of 1974, 20 U.S.C. §§1701-1758. The Act manifests an intention of Congress that mandatory busing not be ordered to a greater extent than is required by the constitution. Section 1712 states that a court shall "impose only such remedies as are essential to correct particular denials of equal educational opportunity or equal protection of the laws."[12] Section 1713 requires a court to consider, make specific findings about, and adopt a series of less onerous devices before requiring busing. These include school assignments close to home, transfers which would improve racial balance, revision of zones, and the construction of new schools and magnet schools.

The Mayor's argument proceeds simply: the masters' plan contemplated mandatory busing for 6,100 fewer students of the 84,000 total student population than did the court's plan; the court did not find that the additional compulsory transportation was required by constitutional necessity; and comparison with other cases demonstrates that in

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[12] One provision, § 1714, facially proscribes any court ordered transportation of a student to a school other than one "closest or next closest to his place of residence" of the appropriate grade level and type of education. The Mayor properly concedes that this section must be read in conjunction with § 1702(b) which states that provisions of the Act "are not intended to modify or diminish the authority of the courts . . . to enforce fully . . . the Constitution. . . ."

fact the masters' plan was constitutionally sufficient; therefore, the court exceeded its powers.[13]

The masters filed their final recommendations on March 31, 1975. On April 10 the school department furnished new statistics on the size and racial composition of the student body, on the basis of which the court modified the recommended plan. As noted by the district court in its May 28 order denying a stay, "the masters' report and recommendations contained the key elements and formed the foundation of the plan promulgated by the court." The most significant change effected by the court was a change in the number of geographic districts from nine to eight. The appellants assert that this change required more busing than the masters' plan would have required had it been updated to reflect the new figures. While this basic factual promise is open to some doubt, we need not rest our decision on such a necessarily

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[13] The Association also argues that the adoption of the masters' plan was required by F. R. Civ. P. 53(c)(2), on the theory that the "delineation of districts was a factual determination" which could not be changed by the district court unless found to be clearly erroneous.

This argument misconceives the type of reference made in this case. Rule 53(c) provides that "[t]he order of reference to the master may specify or limit his powers", and that was done in this case. The Order of Appointment and Reference to Masters of February 7, 1975, specified that the masters were "to conduct hearings and make recommendations for a desegregation plan for Boston public schools together with the reasons for recommending that plan, including discussion of the key issues." This clearly described a mission not involving findings of fact meriting deferential treatment under Rule 53(e)(2). That rule's mandate simply "does not . . . apply where the master is directed only to report the evidence [and] to make recommendations . . . ." 5A J. Moore, Federal Practice ¶ 53.12[2], at 3002; *Matter of Van Swearingen Corp.*, 180 F.2d 119 (6th Cir. 1950). *See Hart v. Community School Board* 383 F. Supp. 699 (E.D. N.Y. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975). This reference was not a substitute for trial, where the master to a large extent takes over the fact-finding process; the district judge could not delegate his duty to evaluate for himself what actions had to be undertaken in order to remedy past failure to comply with the constitution. Indeed, we doubt that the determination of district boundaries is accurately described as purely factual in nature, given the nature of this case.

It is uncontested, moreover, that the figures on which the masters relied in drawing their districts were outdated and invalid in light of new figures submitted by the School Department shortly after the masters' final report was filed. Both as to racial composition and numbers of students in the districts, the new figures rendered the factual assumptions underlying the masters' determination clearly erroneous.

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elusive determination.[14]

We proceed to examine the district court's duties and powers, as they are affected by the Equal Educational Opportunities Act of 1974; whether the court purported to be guided by the Act; and whether its findings and conclusions are sufficiently supported.

Prior to the passage of the Act it was clear that the mandate governing federal judges was to accomplish "the transition to a unitary, nonracial system of public education" in which "racial discrimination would be eliminated root and branch." *Green, supra,* 391 U.S. at 436, 438. They were to make "every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities

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[14] The estimate of 6,100 additional students who would be bused under the court's plan (21,000-court minus 14,900-masters) ignores the impact of the new data, even had the masters' districts remained essentially intact. For example, the Burke district, eliminated by the court, had a capacity of 8,250 and an enrollment projected by the masters of 7,590. But the new statistics revealed it as containing 11,620 students. Even after assuming that some of the overflow would be absorbed by citywide magnet schools, there would remain perhaps 2,000 excess students. The Mayor does not show that shifts in district lines to accommodate these students either by merging contiguous neighborhoods and their schools into Burke or by removing fringe neighborhoods from it would not encounter the difficulty of increasing Burke's percentage of black students, already a high 63%. Although the amount of additional busing that would have been needed to take care of this situation is a matter of conjecture, it would appear to be substantial, if increased segregation were to be avoided.

Not only student population but racial concentration estimates of the masters were at odds with the realities of the new figures. The following discrepancies were found to exist:

	Master's final report	New figures applied by court to masters' districts	Possible result of allowed deviation of ± 10 percentage points within each school
West Roxbury	80% W	93% W	100% W
South Boston	60% W	67% W	77% W
Burke	50% B	63% B	73% B

The result, particularly when the ± 10 point deviation is considered, represented substantial changes, unanticipated by the masters. While the masters gave greater weight to neighborhood identity than did the court, it is far from clear that they would have tolerated the higher concentrations shown by the new data.

The Mayor's assumption that the court's plan would involve anything close to the mandatory busing of 6,100 more students is therefore significantly vulnerable.

of the situation." *Davis* v. *School Commissioners of Mobile County*, 402 U.S. 33, 37 (1971). And in so doing, "the scope of [their] equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann, supra*, 402 U.S. at 15 (1971).

The Act disavows any intention to encroach upon the obligation of the courts "to enforce fully" the constitution, § 1702(b). Moreover, it places reliance on specific findings with respect to the efficacy of particular remedies in the "priorities" section, § 1713, and on a more general finding of the inadequacy of other remedies in § 1755. By explicitly leaving the district court the power to determine the adequacy of remedies, the Act necessarily does not restrict the breadth of discretion of that court to determine what scope of remedy is constitutionally required. Thus the Act manifests a purpose not to limit judicial power but to guide and channel its exercise. In a sense it is a statutory "less restrictive means" guideline, endeavoring to ensure that substantial compulsory transportation be used as a last resort. Our reviewing function remains the limited one of scrutinizing the record for sufficent factual support for the scope of the remedy, its reasonableness and its feasibility. *See Swann, supra*, 402 U.S. at 31. The Act adds the factor that the district court's findings must reflect a substantial consideration of the less restrictive means which Congress has required to be explored and used prior to resorting to compulsory transportation of any magnitude.[15] We turn therefore to an analysis of these two areas.

Initially, we look to whether the remedy imposed in this case reflected the channelling contemplated by the Act. On this question, there can be little doubt. The district court

[15] As the court said in *Brinkman* v. *Gilligan*, 518 F.2d 853, 856 (5th Cir. 1975), "We construe the 1974 Act, read as a whole, as not limiting either the nature or the scope of the remedy for constitutional violations in the instant case."

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clearly purported to be guided by the Act's mandate. In the course of presenting its plan, the court stated:

> "Assignment of every student to the school closest or next closest to his residence, considering only school capacity, natural physical barriers or both, along with grade level and the type of education provided, cannot achieve substantial desegregation in Boston due to the geography of the city and racial and ethnic distribution in the city. 20 U.S.C. § 1713(a)(b), § 1714. Revision of attendance zones and grade structures, construction of new schools and the closing of old schools, a controlled transfer policy with limited exceptions and the creation of magnet schools have been used in the formulation of the plan here adopted in order to minimize mandatory transportation. 20 U.S.C. § 1713. The court finds, however, that some transportation of students to schools other than those next closest to their residences is required to remedy adequately the denial of plaintiffs' constitutional rights and to eliminate the vestiges of a dual school system in Boston. 20 U.S.C. § 1702(b), § 1714(a)." 401 F. Supp. at 264.[16]

We do not understand the Mayor to contest these findings; nor would there be any basis in the record for such a challenge. Rather, the Mayor's theory goes less to which type of remedy (e.g., busing, magnet schools, etc.) was used by the court than to whether the remedial plan as a whole effectuated more desegregation (and as a result more busing) than was required. Since this argument concerns the district

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[16] Additional comments in the same vein are to be found in various parts of the court's opinion filed subsequent to the plan itself:

> "The plan that the court has ordered into effect reflects the court's continuing efforts to hold compulsory busing to a minimum." "The districts in this plan and the guidelines for assigning students have been drawn to minimize required transportation as much as possible consistently with desegregating the city's schools." "The plan adopted by the court attempts to minimize forced busing."

court's discretion in determining the adequacy of the remedy, and therefore gains nothing from the Act which leaves that discretion unaffected, it must stand or fall upon those traditional principles of equity which would govern this issue even were the Act not in existence. We turn, therefore, to those principles and our traditional reviewing function.

It is important to understand what the court's plan accomplished. Assuming that it involves the forced busing of up to — but probably substantially fewer than — 6,100 more students than the masters' plan, what did it get in return? We see the plan as one involving relatively unskewed, contiguous, compact districts without extensive gerrymandering or satellite zoning. It should be borne in mind that compulsory busing occurs only within, not between, districts. Although both the masters' plan and the court's plan leave the East Boston schools 95 percent white, the court's plan eliminated the other virtually one-race schools (as would have existed under the masters' plan in West Roxbury, 93 percent white) and many racially identifiable schools (predictable for the masters' Burke district, 63 percent black). It reduced the racial distortion in the three districts which, under the masters' plan (as the new figures affected it), would have been markedly disproportioned. By reducing racial identifiability, the plan did more to avoid the dilemma of either denying a district's pupils access to citywide schools or allowing the district to lapse back into a one-race status. That the plan was not perfectionist is shown by the parameters of its district ratios, the percentage of whites ranging from a high of 61 percent to a low of 40 percent, in a school population 52 percent white, 36 percent black, and 12 percent other minority. Moreover, a 25 percent deviation was permitted for each district school. This compares with parameters in the masters' plan, when the newer School Department data are taken into account, which are substan-

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tially more extreme at both ends. As for the compulsory transportation, the maximum is a 5 mile, 25 minute trip, the avearge being 2½ miles, 10 to 15 minutes.

Could the district court have reasonably found this additional desegregation to be constitutionally required?[17] To put it another way, does the court's plan go beyond "every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation"? *Davis, supra*, 402 U.S. at 37. The "practicality" of white flight is not a viable basis for declaring the plan invalid. *See* part A 4, *infra*. Apart from the practicality of geography which induced the court to exempt East Boston from Phase II, we see no other geographical factor of significant dimensions. To the extent that funding is a problem, we note that virtually the entire expense of any incremental busing is fundable by the state Board of Education, which supports the court's plan. *See* Mass. G. L. c. 15, § 1I; c. 71,

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[17] The Mayor would have us answer this question in the negative by referring to other cases, affirmed by courts of appeals, where more schools were allowed to remain all black or more dominantly black than the masters' plan contemplated. Apart from the Mayor's assumption that the masters' plan contemplated no school more than about 53% black — an estimate which, in the light of the new data, should be closer to 73% — we reject such a simplistic color matching test to determine the constitutional sufficiency of any plan.

The cases cited by the Mayor reveal the hazard of picking as a control any one statistic of residual racial imbalance which another court may have approved. In three cases, *Mims* v. *Duval County School Board*, 329 F. Supp. 123 (M.D. Fla.), *aff'd*, 447 F.2d 1330 (5th Cir. 1971); *Goss* v. *Board of Education*, 482 F.2d 1044 (6th Cir. 1973) (en banc); and *Northcross* v. *Board of Education*, 489 F.2d 15 (6th Cir. 1973), geographic factors and, at least in *Mims* and *Northcross*, the desire to avoid extensive long distance busing were relied upon to justify the lesser degree of desegregation attempted. In two cases, *Pate* v. *Dade County School Board*, 434 F.2d 1151 (5th Cir. 1970) and *Ross* v. *Eckels*, 434 F.2d 1140 (5th Cir. 1970), while more all black schools were permitted to remain, the courts of appeals had insisted on reducing the number of pupils attending such schools to around 5% of the total school population. Were we to take this statistic as a control, we would have to declare the court's plan, which leaves over 7% of the total student population attending the East Boston white schools, constitionally inadequate. The remaining case, *Carr* v. *Montgomery Board of Education*, 377 F. Supp. 1123 (M.D. Ala. 1974), *aff'd per curiam*, 511 F.2d 1374 (5th Cir. 1975), concededly insisted on a less stringent plan. Whether the desire to avoid cross-city busing would be, in our minds, sufficient to justify the lower objective, we have no reason to decide. The exercise of one district court's discretion, in a particular case, though affirmed on appeal, cannot establish constitutional limits for other courts facing other circumstances.

§§ 7A, 7B, 37I(ii). The amount of additional desegregation which was "purchased" by the court's plan was neither trivial nor disproportionately burdensome. When we ask ourselves whether a slight increase of maximum percentage of planned white enrollment at some schools, or leaving some elementary schools unaffected, or adding a few more magnet schools would achieve the constitutional minimum with less compulsory busing, we realize that the concept of the minimum cannot be identified with precision. Whatever prescription may be adopted by a judge, after months and years of consideration, it is doubtless always possible to make a case that something less will do. We have no basis for holding that the court exceeded its obligation to do all that it feasibly could to extirpate the effects of the constitutional violations over the years.

3. *Alleged Overbreadth of the Remedy.*

On January 20, 1975, the Association submitted a desegregation plan that was designed to restore the racial composition of the Boston schools to that which they would have had in the absence of any illegal official action. It contended that the district court was obliged to determine the extent to which the segregation in the Boston schools was attributable to official action and to limit the remedy to eliminating only that segregation. The factual premise of the Association's plan was that the racial composition of most of Boston's elementary schools and of two of its high schools, Charlestown and East Boston, is the result of residential patterns in Boston and not of the illegal acts of the School Committee. Its plan, accordingly, provided that these schools should not be affected by the court's remedy.

Since the Association's plan challenged the remedial guidelines contained in the district court's order of October 31, 1974, the district court treated the Association's docu-

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ment as both a motion to modify the remedial guidelines prescribed by that order and as a proposed desegregation plan. The district court held a hearing on the issues presented by the Association on January 23, 1974. In support of its plan, the Association offered to introduce evidence that would establish that population patterns, not illegal state action, caused the existing racial segregation in the schools in question. The district court denied the motion to modify the remedial guidelines, holding that the Association's remedial theory was inconsistent with the controlling Supreme Court precedents.[18] The court also held that the Association's desegregation plan was constitutionally inadequate and could not be considered by the masters. Finally, the court refused to admit the Association's evidence, on the grounds that it was irrelevant since the only question before the court at that time was how to accomplish the greatest amount of actual desegregation consistent with the practicalities of the circumstances and that the motion represented an attempt to reopen the findings of fact made by the district court at the liability stage of the proceedings and affirmed by this court. The Association has appealed, contending that the district court erred, first, in refusing to frame the remedy in terms of the specific consequences of the proven constitutional violations, and, second, in rejecting the evidence that the racial segregation in particular Boston schools was not the result of any state action.

The central question on appeal is whether the district court erred in refusing to accept the Association's remedial theory. In support of its theory that the district court must ascertain the extent to which state action caused the existing segregation in the schools and limit its remedy to eliminating that segregation, the Association relies upon the language of

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[18] The district court also ruled that modification was not required by the Equal Educational Opportunities Act of 1974. *See* note 24 *infra*.

the Fourteenth Amendment itself. Since the amendment prohibits only state imposed racial segregation, *see Civil Rights Cases*, 109 U.S. 3 (1883), the Association contends that a district court's remedial power is limited to remedying the specific effects of the "state action" that formed the basis of the constitutional violation.

Although the theory possesses some surface plausibility, the Supreme Court precedents clearly establish that the district court was correct in rejecting the Association's proposed modification of its remedial guidelines. The remedial principles set forth in *Swann*, *Davis*, and *Green* do not tolerate anything less than ensuring that the effects of constitutional violations are eliminated, and we are certain that the application of the Association's remedial theories could not eradicate the effects of state imposed segregation.[19]

To appreciate why the Association's remedial theory must be rejected, it will be helpful to consider the nature of the constitutional violation. In the first stage of this case, the district court found that the School Committee's policies regarding the construction of new facilities, the use of portable classrooms, overcrowding, districting and redistricting, feeder patterns, open enrollment, transfers, and faculty and staff assignments "were all marked by segregative intent" and substantially contributed to the segregated character of dozens of Boston schools. 379 F. Supp. at 426-30, 433-37, 442-45, 455, 459, 466-68, and 472. The latter part of the district court's opinion dealt specifically with the School Committee's defenses that the racial segregation in the Boston

[19] A remedy may sometimes properly "exceed the violation" in that it may do more than eradicate the constitutional wrong. To the extent that "overbreadth" in the remedy is necessary to ensure that the constitutional violation is corrected, it is not at all unusual. There are many instances in the law in which remedial law places greater restrictions on primary activity than did the substantive law that had been violated. For example, a company that is found to have violated the Sherman Act will have its future operations governed by a much more restrictive standard than that imposed by the Sherman Act itself. *See United States* v. *United Shoe Machinery Corp.*, 391 U.S. 244 (1968).

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schools — which it conceded to exist — resulted from private residential patterns and/or its racially neutral neighborhood school policy. The district court found that Boston had never followed a true neighborhood school policy and rejected the defense, relying in part on its earlier findings. 379 F. Supp. at 469-74. These specific findings, many of which related to elementary schools, were the basis for the determination that Boston's school system as a whole violated the Fourteenth Amendment. Although the defendants could have limited the geographic scope of the violation by proving that parts of the Boston school system were geographically unrelated to the rest of the system and had not been operated with "segregative intent," *Keyes, supra,* at 203-05 and 210-13, the School Committee failed to satisfy this burden with respect to any portion of the system. We affirmed the district court's findings and legal conclusions in their entirety, *Morgan* v. *Kerrigan, supra.*

The Association, in effect, argues that the trial on liability should be treated as the first of two battles, and that the second battle should involve a more particularized inquiry into the causes of the segregation at the individual schools within the system. Although the defendants failed, at the trial on liability, to persuade the district court that private residential patterns alone caused the segregation in the Boston schools, the Association maintains that the district court must, at the remedy stage, reconsider the effects of non-official action, determine the degree to which private action caused the existing segregation, and fashion a remedy that preserves the segregation that can be separated from governmental causation. This second battle would be considerably more complicated than the first. The logical implication of the Association's proposal is that it would be proper for any group connected with any school to introduce proof that that school's racial profile was only partially

attributable to official action. The district court could be faced with the task of making percentage findings as to every school in the district.

The short answer to the Association is that its position is squarely contrary to the remedial principles of *Swann*, *Davis*, and *Green*.[20] *See also Keyes, supra*, at 200 and 214. These cases establish that when intentional official action has significantly contributed to segregation in substantial portions of a school system, the individual schools in the system must be subjected to the maximum feasible desegregation if official action "created or maintained" the racial segregation contained therein. *Swann, supra*, at 21 and 28. *See Keyes, supra*, at 214. In the Boston case, the School Committee had the opportunity to prove that official action had not contributed to the segregated character of some of the

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[20] The Association recognizes that *Swann*, *Davis*, and *Green* provide that, during the remedial phase of a school desegregation case, the district court must order the maximum practicable desegregation regardless of the degree to which the actual segregation in the schools is demonstrably the result of unlawful state action. The Association attempts to distinguish these cases on the ground that each involved school systems that had been segregated by statute for years. In such school systems, the Association contends that the application of these remedial principles was warranted because all segregation could be presumed to be the result of illegal official action.

The Association's attempt to limit the applicability of these remedial principles to cases in which there had previously been a statutory dual school system fails. In *Swann* and *Davis*, the Court clearly did not proceed on the assumption that the application of its remedial principles would operate only to eliminate the segregation which was directly attributable to illegal official action. The Court recognized that the segregation in those systems that remained after the school authorities abolished the statutory dual system and adopted a "neighborhood" school policy was, to some extent, a consequence of private residential patterns. *See Swann, supra*, at 25-26; *Davis, supra*, at 36. The Court clearly provided that, although all the remaining segregation in certain schools may not be attributable to illegal state action, the schools must be subjected to the maximum practicable desegregation. *Swann, supra*, at 21 and 28.

The lower federal courts have consistently rejected desegregation plans that attempted to justify the failure to desegregate certain schools on the ground that the racial composition of those schools results from housing patterns. Maximum feasible desegregation is required unless the school authorities can demonstrate that their actions in no way contributed to the segregated character of the individual schools. *See, e.g., Lee* v. *Macon County Board of Education*, 438 F.2d 746 (5th Cir. 1971); *Goss* v. *Board of Education of Knoxville*, 443 F.2d 632 (6th Cir. 1971); *Clark* v. *Board of Education of Little Rock*, 465 F.2d 1044 (8th Cir. 1972); *Brewer* v. *Board of Education of Norfolk*, 397 F.2d 37 (4th Cir. 1960).

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individual schools in the system, but the district court found that the School Committee had failed to satify this burden.[21] Hence, under *Swann*, the district court was obligated to fashion a remedy that would accomplish the greatest amount of system-wide desegregation taking into account the practicalities of the situation. *Swann, supra,* at 15-16; *Davis, supra,* at 37.

The Supreme Court has tacitly recognized the impotence of a remedy designed only to eliminate the demonstrable effects of past official conduct. While de jure segregation may not have been established at each and every school in a system, "common sense", to use the words of the Court, supports the conclusion that effects of the proven discriminatory actions pervade the school system as a whole. *Keyes, supra,* at 201. Acts that establish one school as white or as black will have a reciprocal effect on the racial composition of nearby schools. *Id.* at 202-03; *Swann, supra,* at 20-21. The use of various devices to earmark schools according to their racial compositions may well have had a "profound effect on the racial composition of the residential neighborhoods within the [city], thereby causing further racial concentration within the schools." *Keyes, supra,* at 202. "People gravitate toward school facilities just as schools are located in response to the needs of the people." *Swann, supra,* at 20.[22]

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[21] The Association places extensive reliance on the language in *Swann* that provides that school authorities may, at the remedy stage, attempt to limit the geographic scope of the remedy by proving that the racial composition of the schools in certain areas in the system is in no way the result of present or past discriminatory action on their part. *Swann, supra,* at 26. *Swann,* however, cannot be read as supporting the proposition that causation is at issue during the remedial phase of a school segregation case when there has been a trial on liability. The burden this language describes is essentially identical to that which the presence of substantial intentional segregation shifts to the School Committee during the trial on liability. *See Keyes, supra,* at 203-05, and 210-11. In *Swann,* the school authorities were afforded the opportunity to satisfy this burden at the remedy stage of the proceedings because here had been no trial on liability. Here, of course, the school authorities have had their chance.

[22] For example, although a dominantly white school in a white neighborhood may appear to be wholly the result of the ethnic patterns of the neighborhood,

From a practical point of view, the problems of determining what the racial composition of neighborhoods would have been, absent the unlawful discrimination, would be especially acute in such a case as this where the school authorities did not follow a genuine neighborhood school policy and where one form of discrimination was the locating of new schools and the overcrowding of existing facilities. 379 F. Supp. at 427-29, 469-74; *see Keyes, supra,* at 211-13. The task of unscrambling cause and effect would be, to understate it, awesome.

Even if we assume that the district court could reexamine each school to determine the shares of segregation attributable to public and private action, the application of the Association's theory would fail to vindicate the constitutional rights of many students presently enrolled in the Boston schools. It, of course, is the rights of the individual students that are in question. *Morgan* v. *Kerrigan,* 509 F.2d 599, 600 n. 3 (1st Cir. 1975); *see Brown* v. *Board of Education,* 347 U.S. 483, 494 (1954). Even if the court could reliably determine that 40 percent of a school's segregation was caused by official action and 60 percent by private residential patterns, it could not bifurcate an individual student. The result would inevitably be that some victims of the School Committee's official policy would be forced to continue a segregated education.

Apart from the failure of the Association's theory to remedy the violations of individual rights per se, its adoption would seem to us to turn the process of desegregation on its head. Unconstitutional segregation is defined not only by percentages but also by community and administrative

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when the School Committee has taken steps to incorporate the residential segregation into the schools, to earmark that school as a white school, and to permit white students from other parts of the city to attend it, that school has played a major role in skewing the racial profiles of the other schools in the system.

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attitudes, *see Keyes, supra,* at 196, and by psychological effects, *see Brown, supra,* at 494. To require a district court to preserve intact every scrap of segregated education that somehow can be separated from governmental causation is to involve the federal courts in planning continued segregation and in perpetuating the community and administrative attitudes and psychological effects which desegregation should assuage. *Cf. Wright* v. *Council of City of Emporia,* 407 U.S. 451, 465-66 (1972).[23]

We add one further observation. The court had found that in the past the School Committee had given racially isolated black schools less support, particularly in the quality of faculties supplied, than other schools. The court had good reason to believe that if black and Hispanic students were not spread, visibly and bodily, in the mainstream among schools throughout the system, the racially identifiable schools in which they remained would continue to invite discriminatorily unequal treatment evading timely and effective remedy. A racially mixed population in each school would, on the other hand, be an insurance policy against any purposefully unequal allocation of resources. While the liability phase of this case primarily involved discriminatory separation, the realistic prospect of discriminatory inequality of support for schools which, though no longer subject to racial districting, transfer, or other such policies, remained predominantly black is a pragmatic factor further supporting the court's remedial order.

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[23] The Association places considerable reliance on *Milliken* v. *Bradley,* 418 U.S. 717 (1974), and, in particular, on its statement that "the remedy [in a school desegration case] is necessarily designed, as are all remedies, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Id.* at 746. Although we understand why the Association believes this language supports its position, we read this language as entirely consistent with the continued application of the remedial principles of *Swann* and other such cases. As we have demonstrated, restoring the victims of unconstitutional segregation requires far more than eliminating the specific, demonstrable effects of the proven discriminatory acts. Restoration is necessarily a complex and widespread process.

It is clear, therefore, that practical considerations as well as established principles mandated the rejection of the Association's remedial theory.[24] Hence, we hold that the district court did not err in refusing to modify its remedial guidelines.

It follows that the district court was correct in refusing to admit the Association's evidence on the causes of the existing segregation in the Boston schools. To the extent that the evidence was offered to establish the degree to which illegal state action had caused the racial segregation in the Boston schools, the evidence was legally irrelevant at this stage of the proceedings.[25] The only question before the district court was how to accomplish the greatest amount of actual desegregation consistent with the practicalities of the circumstances. To the extent that the evidence was offered to rebut the *Keyes* presumptions, it came too late and was barred by established principles of preclusion.[26] It is cle-

[24] The Association also contends that the Equal Educational Opportunities Act of 1974 required the district court to adopt its remedial theory. In particular, the Association points to § 213 of the Act, which provides that "in formulating a remedy for . . . a denial of equal protection of the laws, a court . . . shall seek or impose only such remedies as are essential to correct particular denials of . . . equal protection of the laws." 20 U.S.C. § 1712. This language, like the statement from *Milliken* v. *Bradley*, 418 U.S. 717, 746 (1974), discussed in note 23 *supra*, is entirely consistent with the continued application of the remedial principles of *Swann*, *Davis*, and *Green*. Because of the pervasive effects of the School Committee's actions, maximum practicable desegregation is "essential to correct [the] particular denials of equal protection [that occurred]." *See* note 23 *supra*.

[25] At oral argument, the Association argued that the Tenth Circuit's recent decision on remand in *Keyes* v. *School District No. 1*, 521 F.2d 465 (10th Cir. 1975) (*Keyes II*), supports its contention that, even after a trial on liability, the district court is under an obligation to receive evidence on the discriminatory effects of the proven violations as part of its task in fashioning a remedy. *Keyes II* in no way supports this proposition. The evidence the district court admitted in *Keyes II* pertained to the question of liability, not to remedy. *Id.* at 471-73.

[26] The Association suggests that it should be permitted to attempt to rebut the *Keyes* presumptions now because the defendant School Committee was not afforded an opportunity to do so at the liability stage of proceedings since *Keyes* had not been decided at that time. We find this suggestion utterly without merit. The effect of *Keyes* was before the district court during the trial on liability, it having been decided on June 21, 1973, a time when that trial had been

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mentary that the district court was not required to reopen factual findings and legal conclusions reached after vigorous litigation — the whole point of which was to determine whether the segregation which concededly existed was caused by unconstitutional state action — and affirmed on appeal. *See, e.g., White* v. *Higgins,* 116 F.2d 312, 317-18 (1st Cir. 1940); *Bee Mach Co.* v. *Freeman,* 131 F.2d 190, 192-93 (1st Cir.), *aff'd,* 319 U.S. 448 (1943); *Hodgson* v. *Brookhaven Gen'l Hospital,* 470 F.2d 729 (5th Cir. 1972).

4. *The "White Flight" Controversy.*

The district court ruled that "white flight," defined as the departure of white children from the Boston city schools to parochial, private, or suburban school systems, is not a practicality for which the plan must make an accommodation. *Morgan* v. *Kerrigan,* 401 F. Supp. at 233-34. *See Davis, supra,* at 37. The Mayor and the Association challenge this ruling as an abuse of discretion, claiming that "white flight" alters the effectiveness of a desegregation plan and leads to "resegregation" of the schools.[27]

White flight is an expression of opposition by individuals in the community to desegregation of the school system. *Monroe, supra; Jackson* v. *Marvell School District No. 22,* 416 F.2d 380 (8th Cir. 1969); *Lee* v. *Macon County Board of Education,* 448 F.2d 746 (5th Cir. 1971). From the inception of school desegregation litigation, accommodation of opposition to desegregation by failing to implement a constitutionally necessary plan has been impermissible. *Brown* v. *Board*

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reopened. The School Committee did not seek a reopening on the issues presented by *Keyes;* it described *Keyes* as a restatement of the principles of the earlier Supreme Court decisions. In any event, the district court found that the record was sufficiently complete to apply *Keyes,* 379 F. Supp. at 479, and that finding was not challenged on appeal.

[27] In the alternative, it is claimed that the district court should have taken white flight into account in modifying the masters' plan. *See* Part A 2, *supra.* The masters, however, rejected considerations of white flight in drafting their plan.

of Educaton, 349 U.S. 294 (1955) *(Brown II).*[28]

Appellants contend, however, that white flight differs from other forms of opposition, because its effects, the withdrawal of white pupils from the school system, alter the effectiveness of the desegregation plan. The school system, they claim is "resegregated": the city school system largely black and other minority; the private and suburban systems, largely white.[29] To prevent this result, appellants claim that

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[28] "But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." 349 U.S. at 300.

[29] Subsequent to the district court decision, we allowed to be filed, subject to a determination of relevance, voluminous affidavits and other materials by social scientists on the subject of white flight.

The admissibility of these submissions have been attacked as being outside the record, F.R.A.P. 10(a), and as hearsay. The materials have been defended as sociological data in the nature of "legislative facts" relevant to a determination of the law governing the district court in this matter.

For reasons we discuss in the text, we reject all these materials as irrelevant to the issues before us on this appeal. We include a brief synopsis of these materials to illustrate the difficulty in evaluating white flight if it were relevant.

The data submitted initially by the Association consists of an affidavit and report prepared by James S. Coleman, Professor of Sociology at the University of Chicago. Dr. Coleman states that his recent study shows that while there is decreasing segregation within school districts, segregation between school districts in the same metropolitan area is increasing; that rapid increase in loss of white children from central city schools follows immediately after school desegregation; and that as a consequence, desegregation has not significantly raised the levels of academic achievement of blacks.

Plaintiffs counter with the transcript of testimony given by Jane R. Mercer, Associate Professor of Sociology, University of California at Riverside, in a case involving Indianapolis. Her testimony shows that she studied desegregation in school districts thoughout the state of California; that white exit to private schools is a short term phenomenon; and that declines in white population in the cities are part of a long term demographic trend independent of desegregation. The plaintiffs also submit a paper written by Meyer Weinberg, Editor of *Integrated Education* magazine, which summarizes other studies showing white flight to be an avoidable phenomenon, not an inevitable consequence of mandatory desegregation. Weinberg's paper and another paper written by Professors Green of Michigan State University and Pettigrew of Harvard University, criticize Dr. Coleman's methodology, claiming that the source of his raw data is unknown; that failure to evaluate large cities which have been subject to massive desegregation orders separately from large cities which have not been subject to court orders undermines the study's relevancy; and that failure to control for other variables, which may be correlated with white flight, jeopardizes the validity of his conclusions.

Dr. Coleman replies in an affidavit filed with a copy of a working paper, "Trends in School Segregation, 1968-73", In his affidavit, Dr. Coleman states that the report previously filed with the court was prepared for oral delivery and was based on the attached working paper. He defends his methology, states that his conclusions are consistent with the findings of the studies cited by

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the district court should consider white flight a "practicality", and limit the amount of desegregation to that level which would enjoy acceptance in the white community.[30]

There are two endemic flaws in this argument. First, in

Weinberg, and the studies conducted by Dr. Mercer. Dr. Coleman states that his study shows that massive white flight will occur when there is a significant decrease in segregation in a city where there is a high proportion of blacks in the central city and suburbs of a significantly different racial composition.

Plaintiffs, in rebuttal, file another study prepared by Christine H. Rossell, of Boston University. The Rossell study, prepared from data on 86 northern school districts subject to court ordered or legislatively enacted school desegregation, suggests that white flight is minimal and a temporary reaction to school desegregation. Plaintiffs claim that Dr. Rossell's study differs from Dr. Coleman's in that Dr. Rossell deals only with northern school districts subject to desegregation plans while Dr. Coleman does not distinguish between forms of desegregation.

In the final submission, Dr. Coleman defends his study against the Rossell findings, suggesting that her analysis is inadequate to examine the effects of desegregation on a core city school system. He further claims that his model has proved accurately predictive of the Boston experience.

Throughout this series of submissions this court has been burdened with reports written for sociologists by sociologists utilizing sophisticated statistical and mathematical techniques. We lack the expertise to evaluate these studies on their merits. We do come to one conclusion, however. The relationship between white flight and court ordered desegregation is a matter of heated debate among experts in sociology, and a firm professional consensus has not yet emerged.

Appellants have also filed with this court copies of the Boston School Department's current census of students according to race and minority group. The figures facially suggest loss of a significant number of white enrollees. We note, however, that the district court is currently studying the accuracy of past enrollment data. We decline to make any conclusions concerning the existence or nonexistence of white flight on the sparse figures available to us.

[30] Appellants suggested approach would necessarily involve the district court in something like the following analysis: (1) take evidence concerning the prospects of white flight under the various plans proposed; (2) exclude the causes of such flight attributable to any historic trend, or such factors as overcrowding, transportation difficulties, deteriorated housing, taxes, crime, pollution, industrial migration, etc.; (3) make a judgment as to the effect which different levels of desegregation would have on white flight; and (4) select or devise that plan which will incorporate enough desegregation to bring about the maximum amount of inter-racial contact in the schools after taking account of the white flight such desegregation would be expected to induce.

The experts have difficulty in attempting to justify conclusions as to the effect of past desegregation plans on white flight, *see* note 29 *supra*; the task of making estimates of expected exodus of whites attributable to varying future desegregation plans would seem to be more difficult. Conceivably, public attitude sampling could be undertaken, using various hypotheses. This might involve questioning parents in a particular section or school district whether they would be likely to place their child elsewhere, or move, if the child were to attend a school which was x, y, or z percent black. The possibility is a real one that surveys would indicate that the prospect of any substantial amount of desegregation or busing would provoke sufficient expressions of intent to flee as to negate any desegregation plan. Alternatively, if expressed intentions were to be heavily discounted, their utility would accordingly diminish.

the trial on liability, evidence was presented that feeder patterns, district lines, and open transfer policies were established for the purpose of satisfying purported white community desires. 379 F. Supp. at 438, 449. This evidence resulted in a finding that the Boston schools were administered in violation of the Fourteenth Amendment. Appellants now ask that the district court, in devising a remedy for these violations, respond in the same way as the Boston School Committee did to the same perceived community attitudes: draw district lines, assign pupils to schools, and limit racial mixture to reduce "white flight". In other words, while appellants dwell upon the unpleasant prospect of an inner city black school system surrounded by suburban white school systems, the prospect contemplated by their approach is that of an inner city segregated system, created unlawfully, but permitted to endure because the apprehension of massive white flight has made legal what had once been in violation of the constitution.

Second, appellants' claim that white flight destroys the effectiveness of the school desegregation plan, because of "resegregation" of the school system, founders on the constitutional definition of unlawful segregation. The Supreme Court has recently reemphasized that the constitutional right is to attend school in a unitary, non-discriminatory, public school system. It is not to attend school in a system which is comprised of students of a racial balance which exists in the general geographical area. *Milliken* v. *Bradley*, 418 U.S. 717, 746 (1974). *Accord Calhoun* v. *Cook*, No. 74-2784, slip op. at 396 (5th Cir. Oct. 23, 1975); *Mapp* v. *Board of Education of Chattanooga*, Nos. 74-2100-01, slip op. at 3-6 (6th Cir. Oct. 20, 1975). What the layman calls "resegregation" is not constitutionally recognized segregation. It is racial isolation imposed by historic school district boundaries, *Milliken* v. *Bradley, supra*, or by individual choices to

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attend private institutions. *Compare McCrary* v. *Runyon*, 515 F.2d 1082 (4th Cir.), *cert. granted*, 44 U.S.L.W. 3279 (1975). This racial isolation becomes constitutionally significant only when the district boundaries are drawn with segregative intent, *Evans* v. *Buchanan*, 393 F. Supp. 428, 445-46 (D.C. Del.), *aff'd*, 44 U.S.L.W. 3295 (1975); *United States* v. *Missouri*, 515 F.2d 1365 (8th Cir.), *cert. denied*, 44 U.S.L.W. 3272 (1975); *see United States* v. *Scotland Neck Board of Education*, 407 U.S. 484 (1972), or when the state participates in the private institutions. *Norwood* v. *Harrison*, 413 U.S. 455, 463-65 (1973).

The constitution cannot solve all problems. On the contrary, to the extent that it demands that rights which have previously been overridden be enforced, it creates social problems. It inconveniences, sometimes substantially, law enforcement officers, prison wardens, university administrators, and government bureaucrats. And, when it allows tasteless books to be sold or movies shown, many are offended. But expectable individual, official or group reaction does not outweigh constitutional rights. We therefore must agree with another court which said, "concern over 'white flight' . . . cannot become the higher value at the expense of rendering equal protection of the laws the lower value." *Mapp* v. *Board of Education of Chattanooga*, *supra*, *quoting* 366 F. Supp. 1257, 1260 (E.D. Tenn. 1973).

The bright note in this otherwise somber picture is the care and imagination that the district court has displayed in structuring a diversified educational system offering superior opportunities for children, both white and black. The plan is not a mechanical device to ensure that the races share equally, but serves its constitutional goals within a framework offering educational hope for the children of the city. Nevertheless, federal courts have a limited jurisdiction and

competence. To the extent that reorienting the Boston school system involves social expenses, it must be paid for in coin less dear than the constitutional rights of the city's citizens. Here as elsewhere, the Boston community must look to other institutions, city, state, federal and private, to contribute to an effort to vindicate the consitutional rights of its citizens at a minimum of social cost.

B. *Detailed Challenges to the Court's Plan.*

The issues we have discussed above address the constitutional and statutory limitations on the court's power to issue a plan at variance with the Committee's or the masters' plan (Parts A 1 and 2) and to refuse, in tailoring its plan to consider evidence of the precise impact of prior official segregative actions and of the extent to which its plan might cause the departure of white students from the school system (Parts A 3 and 4). We now consider a range of more specific objections to particular features of the plan and its method of implementation.

1. *Ratios and the Examination Schools.*

Appellants School Committee, Mayor and Association challenge the district court's use of racial percentages and quotas in several contexts: the guidelines for the composition of the schools in community school districts, the guidelines for the composition of citywide magnet schools, and the minimum percentage of black and Hispanic students mandated to be admitted to the elite, examination schools. Appellants claim that the district court's use of percentages was in violation of the Supreme Court's disapproval of fixed racial quotas in *Swann, supra.* We find that the district court resorted to percentages in an appropriate manner throughout.

The district court first ordered the overall racial composition to be used as a starting point in designing a school desegregation plan. This approach is specifically approved in

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Swann. In devising the court plan, community school districts were drawn to provide for a rough equality of racial composition among the districts to be desegregated.[31] Within each community school district, the court ordered that students should be assigned to particular schools so that each school's population approximates the composition of the community district. A deviation margin of ± 25 percent of the racial percentage figures was allowed to provide flexibility in planning. The desegregated schools in Boston, therefore, range between 30-70 percent white and 30-70 percent black and other minority under the plan.[32] This use of statistical ranges is consistent with other desegregation cases, *United States* v. *School District of Omaha*, slip op. 35-37 (8th Cir. June 12, 1975) (citywide school racial composition, 80% W - 20% B; schools to be 0-35% B, 65-100% W); *Yarborough* v. *Hulbert-West Memphis School District No. 4*, 457 F.2d 333 (8th Cir. 1972) (citywide elementary schools 47% W-53% B; schools to be 30-70% W, 30-70 B), and does not establish racial quotas in contravention of *Swann*.

A more significant challenge is made to the guidelines for the composition of the citywide magnet schools. Each school is to limit its enrollment to fall within 5 percentage points

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[31] Rough equality between districts was desirable to allow students from all the districts equal access to the citywide magnet schools without adversely affecting desegregation of the districts.

The district court divided the school system into eight community districts and a ninth citywide district. The overall racial composition of the system for the 1975-76 school year was projected at 51% white (W), 49% black and other minority (B&OM). The projected enrollments in the seven community districts which would be desegregated ranged in racial composition from 61% W — 39% B&OM to 40% W — 60% B&OM. The eighth district, East Boston, was left predominantly white because of its isolated geographic location.

[32] In district 4, with a projected racial composition of 61% W — 39% B&OM, the permitted variance of the composition of the schools is 70% W — 30% B&OM; 50% W — 50% B&OM. Because the percentage of black and other minority students cannot fall below 30% (39% — 25% (30) = 30%), the percentage of white students cannot rise above 70%. The same observation, in reverse, pertains to district 7, which is 40% W — 60% B&OM.

of the citywide racial composition.[33] The district court found that a narrow range of enrollment ratios was permissible for schools in the citywide district because the practicalities to be accommodated, primarily geographic elsewhere in the system, were significantly smaller in the citywide district schools.

There are, moreover, substantial positive reasons for enforcing a narrow range of permissible enrollments. The magnet schools were designed to maximize voluntary desegregation. Significant departures from the overall racial composition could cause the magnet schools to hinder rather than help the process of desegregation. First, attendance at the schools is voluntary. Few individual students will choose to attend a school which is predominantly of the other race. Second, the students attending the magnet schools come from the community school districts. If disproportionate numbers of one race transfer to the citywide school district, the racial composition of the community districts suffer. Fundamentally, the magnet schools, in order to prove of value to the desegregation plan, had to be carefully circumscribed to ensure that they would not serve as a haven for those seeking to attend a school predominantly composed of those of their own race.

Finally, appellants challenge the district court's order that at least 35 percent of the incoming class at the elite, examination schools be black or Hispanic as a racial quota. At face value, this directive does appear to establish a fixed racial balance for those classes at Boston Latin School, Boston Latin Academy, and Technical High School. But, once the schools are viewed as magnet schools, and as part of the citywide school district, the objection disappears.

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[33] Since citywide project composition was 51% W — 49% B&OM, magnet schools could permissibly enroll 56-46% W, 44-54% B&OM. The bilingual, bi-cultural magnet, Hernandez, was excepted from this requirement.

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True, these schools are treated differently from the other magnet schools in that only the entering classes are desegregated, rather than the entire student body. This is to accommodate the cumulative nature of the instruction offered at these schools. For the entering classes, however, the district court's order provides that the racial composition shall be similar to that of the other magnet schools: at least 41% black and other minority.[34] It is, therefore, no more an impermissible racial quota than are the guidelines established for magnet schools generally.

There are, however, other, more fundamental challenges to the district court's treatment of the examination schools. The Association protests the schools' inclusion in the remedial plan since no specific segregative acts were proven in their administration. It also claims that a racial preference for admission is unconstitutional discrimination on the basis of race. The Mayor challenges the rejection of several alternative plans for the desegregation of the examination schools which would have imposed specific admissions criteria.

We start with the proposition that it is not unconstitutional per se for a city school system to operate an elite school even though low income or minority children may be under-represented in the student body, *Berkelman* v. *San Francisco Unified School District*, 501 F.2d 1264, 1267 (9th Cir. 1974). The examination schools in Boston, however, are an integral part of a school system which has been found to be administered in an unconstitutional manner. They are presumed to be unlawfully segregated. *Keyes, supra.* As

[34] The entering classes normally enroll 6-8% Asian-Americans. When these numbers are added to the black and Hispanic students, the percentage of the entering class which is characterized as black and other minority is in the range of 41-43%. As school officials testified that it would be difficult to find sufficient black and Hispanic students to satisfy the minimum figures, the district court apparently did not consider it necessary to place an upper limit on minority enrollment.

such, the examination schools must be part of the remedial plan. *See* Part A 3, *supra*.[35]

Several other plans for desegregation of the examination schools were presented to the district court. All relied on the Secondary School Admission Test (SSAT) to establish admissions criteria.[36] The district court found that the SSAT, although apparently of some predictive accuracy, had not been validated as a means of identifying students who can benefit from the examination schools' curricula. *Cf. Castro* v. *Beecher*, 459 F.2d 725, 732, 735-36 (1st Cir. 1972). Because of the limited amount of statistical data available, moreover, there was no assurance that any of these plans would admit a significant number of minority students. Given these factors, we find that the court acted within its discretion in rejecting the alternative plans.

The appellants claim that the district court's order will destroy the examination schools as elite academic institutions. If the order were inflexibly to require, for some years to come, the admission of blacks and Hispanics despite demonstrable underqualification by validated selection processes, we would hesitate to affirm. But the order is a temporary expedient, designed to ensure that the examination schools

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[35] This fact also disposes of the Association claim that imposing a racial preference at the examination schools is unconstitutional for those reasons expressed in Justice Douglas' dissent in *DeFunis* v. *Odegaard*, 416 U.S. 312, 320 (1974). Whatever the constitutionality of racial preferences in the absence of past unlawful discrimination, they are a basic tool in remedying constitutional violations. *See Castro* v. *Beecher*, 459 F.2d 725, 737 (1st Cir. 1972).

[36] The old method of selecting admittees to the schools was mandated by a consent decree between the School Committee and the Massachusetts Commission Against Discrimination (MCAD). This decree introduced the SSAT and admission was based solely on the scores of that test. As the plaintiffs were not parties to the MCAD litigation, the district court was not bound by the consent decree.

An alternative plan, proposed by the alumni associations of the affected schools, would have had 65% of admission based on the SSAT scores alone, the remaining 35% to be chosen in racial proportions but setting a score in the 50th percentile on the SSAT as a floor for admissions.

The masters' plan allowed for grade point averages as well as SSAT scores to be used, but adopted the use of a SSAT score floor.

participate in the desegregation of Boston schools, pending development of racially neutral admissions criteria and the desegregation of the elementary schools. Advanced work classes at the elementary level which successfully feed students into the examination schools are being desegregated. Therefore, there is promise that more minority students will become eligible for admission to the examination schools under any admissions standard.[37] The parties have been specifically invited by the court to develop admissions criteria which can be shown to identify accurately students who can benefit from the examination schools' programs 401 F. Supp. at 244. *See Smuck* v. *Hobson*, 408 F.2d 175, 187-90 (D.C. Cir. 1969). We are convinced that the district court will monitor the progress of desegregation in the examination schools and will adjust its future orders to ensure the continued vitality of these schools as elite institutions. For the present, however, we affirm the court's treatment of the schools as within its discretion.

2. *Challenges to Composition of Masters' Panel Expert Dentler and to the Masters' Compensation.*

After the various desegregation plans had been submitted, the district court appointed two experts to assist it in evaluating the plans and also appointed a panel of four masters to consider the desegregation plans, hold evidentiary hearings, report to the court and recommend a desegregation plan. It also directed the city defendants; the School Committee, and the Superintendent of Schools, to pay the masters compensation of $200 per diem plus expenses. The School Committee objected to the appointment of three of the masters — Francis Keppel, Charles Willie, and Edward McCormack — and of one of the experts — Robert Dentler — on the

[37] Appellants claim that only 25% of admittees come from advanced work classes. While it is obvious that the examination schools cannot be completely desegregated by the advanced work classes, desegregation of the classes is a positive step.

grounds that their associations with the plaintiffs rendered them unqualified to serve.[38] These objections were overruled, and the masters and experts performed their assigned tasks. On May 2, 1975, the district court ordered the city defendants to pay the masters compensation of $21,906.13. The School Committee objected,[39] but its objection was overruled. The School Committee appeals the district court's rulings on the qualifications of the masters and expert and on the masters' compensation.

There is no merit to the School Committee's contention that the district court's failure to disqualify the masters and expert constituted reversible error. We observe, preliminarily, that the chance of error, if any, inflicting prejudice was remote. We have held that the masters' and district court's rejection of the School Committee's desegregation plan was constitutionally required. The masters' plan, while relied upon by the district court, was itself strengthened by the district court and thereby made less acceptable to the School Committee. Moreover, the impartiality of the masters is suggested by their criticism and rejection of the plaintiffs' plan. Thus, any error would seem to us to have been rendered harmless. *See Swann* v. *Charlotte-Mecklenburg Board of Education*, 431 F.2d 138, 148 (4th Cir. 1970), *rev'd on other grounds*, 402 U.S. 1 (1971). We need not rest our decision on this basis since we agree that there were no grounds for disqualifying any of the masters or experts.

The basis for the School Committee's objections to Mas-

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[38] The district court rested its decision on the qualifications of Master McCormack and Expert Dentler on the alternative ground that the School Committee's objections were not timely filed. The objection to the qualifications of these individuals took the form of a motion to expunge filed on March 4, 1975, more than a week after the masters' hearings concluded and almost a month after the February 6 deadline for filing objections. Since we hold that the district court did not err in its ruling on the merits, we need not reach this point.

[39] We need not express an opinion on the timeliness of this objection in the light of our holding on the merits.

ters Keppel and Willie is that they have been associated with the Harvard University Graduate School of Education and thus are indirectly related to the Harvard Center for Law and Education, three of whose staff attorneys have helped represent the plaintiffs in this case. The ground for the objection to Master McCormack and Expert Dentler is that they have supported the NAACP which, although not a party, supports the plaintiffs' suit, has advanced funds to cover disbursements, and has permitted its General Counsel to serve as one of plaintiffs' counsel. The relationships of these individuals to the plaintiffs' counsel are attenuated. Master Keppel was Dean of the Graduate School of Education until 1962 and Master Willie has been a member of the faculty there since 1974.[40] The Harvard Center for Law and Education, which was founded in 1969, is completely independent of the Graduate School of Education. Although it is housed in the Graduate School, it is funded by the federal government and pays the Graduate School for space and services. We fail to see how a relationship with the Graduate School could give rise to a reasonable inference of possible bias in favor of the plaintiffs with respect to the scope of the desegregation remedy in this case. We reach a similar conclusion with respect to the other master and expert. Expert Dentler has been a member of the NAACP in the past, but could not remember whether he paid his dues for 1975. Master McCormack became a life member in 1960. Although these relationships suggest general agreement with the goals of the NAACP, they hardly provide a reasonable basis for concluding that these individuals would be biased in the plaintiffs' favor with respect to the breadth of the desegregation

[40] On appeal, the School Committee suggests that it was improper for the district court, in considering the School Committee's objections, to rely upon interviews with Masters Keppel and Willie and upon representations of plaintiffs' counsel. It is clear from the record, however, that the School Committee acquiesced in this method of investigation.

remedy. We note, moreover, that several of these individuals have relationships with the School Committee which might, to an equal extent, suggest bias in the School Committee's favor.[41]

Since masters and experts are subject to the control of the court and since there is a need to hire individuals with expertise in particular subject matters, masters and experts have not been held to the strict standards of impartiality that are applied to judges. *See United States* v. *Certain Parcels of Land*, 384 F.2d 677, 681 (4th Cir. 1967); *Scott* v. *Spangler Bros., Inc.*, 298 F.2d 928, 931 (2d Cir. 1962). *Cf.* 28 U.S.C. §§ 144, 455. Here, we doubt that, even under the strict standards applied to judges, the district court erred. Motions to disqualify judges have frequently been denied even in cases far stronger than this case. *See, e.g., McNeil Bros. Co.* v. *Cohen*, 264 F.2d 186, 188-89 (1st Cir. 1959); *Eisler* v. *United States*, 170 F.2d 273, 278 (D.C. Cir. 1948); *Darlington* v. *Studebaker-Packard Corp.*, 261 F.2d 903, 906 (7th Cir. 1959); *Weiss* v. *Hunna*, 312 F.2d 711, 714 (2d Cir. 1963). We conclude that these individuals were qualified under the more relaxed standards that are applied to masters and experts.

The School Committee's challenge to the order that it pay the masters' compensation is also without merit. The district court has broad discretion in fixing the amount of such compensation and in determining which of the parties to charge. F.R.Civ.P. 53(a). Here there is no basis for concluding that the district court abused its discretion. The grounds for the School Committee's objection is its belief that the reference to the masters was unnecessary and unwise and that the masters expended a great deal of time and

[41] The Harvard Graduate School of Education has, on several occasions, been hired by the School Committee to conduct surveys. Expert Dentler, in his capacity of Dean of Boston University's School of Education, has done work for the Committee. Thus, three of the four individuals challenged have benefitted financially from their relationships with the School Committee.

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energy fruitlessly. Assuming arguendo that these allegations would constitute grounds for setting aside the district court's order, we note that the district court reasonably reached contrary conclusions regarding the necessity and utility of the masters' work. We hold that there was no abuse of discretion.

3. *Alleged Encroachment on School Committee Functions.*

To effectuate its plan in this case, the district court adopted what it called a "multiplicity of measures" beyond the mechanical redistribution of students. The broad purpose of these measures, as articulated in the opinion below, was effective implementation of equal educational opportunity through banning active discrimination, meeting the persisting effects of past discrimination, and alleviating the difficulties of transition to a desegregated situation. The School Committee concedes these are proper goals, but objects to some specific measures as encroachments on its traditional powers and functions. Although we discuss the challenged provisions individually below, the greatest justification of each, in our view, is common to all.

The overriding fact of the matter is that the district court in this case has had to deal with an intransigent and obstructionist School Committee majority. These elected officials engaged in a pattern of resistance, defiance and delay. *See generally* Part II of the opinion below; on previous Committee resistance to state desegregative efforts, *see* 379 F. Supp, at 418-21, 429-32, 438-41, 451-56, and 477. The most visible recent example of such conduct was their refusal to authorize submission to the court of the desegregation plan drawn up by the Committee staff, an action which provided the basis for subsequent contempt convictions; upon the rather lenient purging of those convictions, they then submitted a freedom of choice plan which they knew was inadequate. And they

did not hesitate to manifest directly to the court their unwillingness to cooperate with the effort to desegregate the Boston schools. The court addressed interrogatories to the Committee members late in December, 1974, relative to their willingness to promote the peaceful implementation of the Phase I interim plan in effect during 1974-75. The then Chairman responded: "I will continue to obey lawful orders of the Court, but I will take no initiative or affirmative action to advocate or supplement this plan . . . ." Similar responses were made with respect to the future promulgation of a court-developed plan. In short, the obstruction by the School Committee was substantial and the district court had every reason to believe it would continue. This crucial fact justifies, in our opinion, a number of extraordinary measures which might otherwise be open to question.

a. *Specifying magnet programs.*

The School Committee does not object to the concept of magnet schools; indeed, Boston has had a number of such schools for many years. The Committee's plan retained these, and proposed a total of about 50 magnet programs, more than twice as many as the court's plan provided for.[42] The narrow objection under this heading is to the court's specification of the particular programs to be developed at several of those schools.[43]

The magnet schools play a central part in the court's desegregation scheme. The citywide school district contains an

[42] The experts and masters felt this number would so saturate the city as to deny the magnet schools a desegregative effect, their raison d'etre. *See* note 10, *supra.*

[43] The court's plan left intact the programs of those citywide schools which had established themselves over the years as magnets, and it apparently adopted a number of the magnet programs as proposed in the Committee plan. The Committee's appeal is addressed only to five or six instances where it is felt that the court's plan is inconsistent with its own proposals.

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unusually high number of these facilities meant to attract students from all over the city to specific distinctive programs that appeal to them. If successful, this desegregative tool will stimulate substantial voluntary student transportation, reducing forced busing; and 20 U.S.C. § 1713(f) required the court to look to magnet schools before resorting to mandatory transportation beyond the next nearest school. Implicit in the power to use magnet schools, at least upon the default of the School Committee, is the power to specify programs essential to make them magnetic. In this case, that power was more crucial because of the importance of the magnet schools to the plan being implemented.

We do not find in the record below any School Committee objection to the court's power to order programs, or to the specific programs required. Nor do we see any indication that the district court would be unreceptive to any equally attractive programs which the School Committee might desire to substitute for those provided for in the court's plan. Good faith cooperation by the Committee would appear to be all that is required.

b. *The contracts with colleges and universities.*

As part of its effort to provide magnet programs that would be distinctive and attractive enough to work, and more generally to equalize educational opportunity, the court enlisted the aid of a number of area colleges and universities, each to participate in the development of programs at specific schools. The court ordered the school department to "use its best efforts to negotiate a contract pertaining to each paired school acceptable to both the School Committee, and the contracting institution of higher learning." 401 F. Supp. at 247. The court refrained from specifying any of the op. at 84. The court refrained from specifying any of the terms of these contracts, except to note that the institutions should not "usurp or replace the proper role of the School

Department or any of its employees . . . ." The state defendants, which have advanced $900,000 and are likely to absorb much of the future cost of his project, *see* Mass. G. L. c. 71, § 37I; c. 15, § 1I, and 401 F. Supp. at 246, and the Boston Teachers Union support this aspect of the court's order; but the School Committee charges that it enters the area of quality of education, and is thereby outside the court's authority.

"In default by the school authorities of their obligation to proffer acceptable remedies, a district court has a broad power to fashion a remedy that will assure a unitary school system." *Swann, supra*, 402 U.S. at 16. The magnet schools were a central part of the court's remedy, but to accomplish their purpose they had to be both well conceived and implemented in good faith. The School Committee takes out of context remarks of the court that assistance of the colleges would improve the quality of education in the system and "wonders how the issue of quality of education arose". This argument — that the court has no legitimate function to improve quality — entirely misses the point that if magnet schools are to act as lodestones, drawing students voluntarily to their programs, quality is a key to this aspect of a plan of desegregation. And the court had been led in the clearest terms to understand that the Committee would do only what it was ordered to do. Reliance on the Committee to create imaginative programs of utility and attractiveness would not only have been ill advised, but the supervision of compliance in this area, as opposed to student assignment for example, would have been extraordinarily complex and might well have drawn the court into purely educational decisions. Paradoxically, therefore, the resort to outside contracting may have an effect precisely the opposite to that alleged by the appellants. In ordering the contract talks, the court removed itself from the

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content of educational decisions as much as possible by mandating best efforts negotiation rather than any specific provisions. In the context of this case, that order amounted to the most reliable and least intrusive method of ensuring that the School Committee would act to implement the magnet school provisions, which in turn were important to make the remedial plan work.

This provision of the order, being innovative, is without precise precedent in other cases. But in light of the background of the case and the particular objective being served, we hold the best efforts provisions to be within the equitable discretion of the court.

c. *The citywide and community councils.*

The Citywide Coordinating Council and Community District Advisory Councils were established to monitor implementation on behalf of the court. The CCC was also charged with trying to identify and resolve problems, but was explicitly not authorized to "co-manage or make policies for the Boston schools."[44] Citizen participation in the desegregation process was embodied in the Community District Advisory Councils, drawn largely from the unobjected-to racial-ethnic parents' and students' councils established the previous year. Such groups have been approved in many cases, *e.g.*, *Dowell* v. *Board of Education*, 465 F.2d 1012, 1015-16 (10th Cir. 1972); *Singleton* v. *Jackson Municipal Separate School District*, 426 F.2d 1364, 1370 (5th Cir. 1970).

The challenge to these provisions asserts that they involve more than mere monitoring. The Committee objects that the CCC's duties of attempting to resolve problems and of offering advice to the school department infringe on the Com-

[44] The city defendants, charged with paying the costs, have not objected to these councils.

mittee's power to have general charge of the schools. As we view the mandate, however, no substantive power was accorded to the CCC and CDACs. Apart from the invaluable function of clustering groups of different generations and races in an attempt to promote citizenship understanding and support, the monitoring process is a basic responsibility of the court. To the extent that the myriad of minor problems which will arise can be resolved without the necessity of resorting to the district judge, the process of implementation will be facilitated.

The Committee objects that the CCC was instructed "to support efforts to improve the quality of education." Attention to educational programs from the perspectives of banning active discrimination, assuring equal educational opportunity, meeting the effects of past discrimination, and alleviating the transition to desegregation is obviously a proper goal needing no justification. While better quality education as a general goal is beyond the proper concern of a desegregation court, we do not view the court's instructions to be divorced from its efforts to devise an effective plan of desegregation.

d. *Additional supervisory personnel.*

Since the court's plan established three more districts than had previously existed, it required three more district superintendents to be hired. This requirement is contested, but not vigorously. The more major objection is to the court's order that each elementary school be headed by an administrator of the rank of headmaster or principal.

If these provisions were reasonable, both were within the power of the district court. The equalization of educational opportunity through the implementation of the desegregation remedy at the schools requires effective administration. Similar orders have been upheld routinely. *See Davis* v.

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School District of City of Pontiac, 487 F.2d 890 (6th Cir. 1973); *Plaquemines Parish School Board* v. *United States*, 415 F.2d 817, 821 n. 2 (5th Cir. 1969). But the Committee (joined in this point by the Mayor), argues that the order as to elementary school administration was arbitrary and unreasonable, and therefore an abuse of discretion. The elementary schools previously were joined in multi-school districts headed by district principals. With the dissolution of these multi-school units, a number of which the district court had found to be segregated within themselves, 379 F. Supp. at 437, over 100 elementary schools exist under the court's plan, including six with a capacity between 100 and 180 students. The School Committee charges that the court's order would require 80 new principals; the Mayor, perhaps partly because he concedes the need for principals in each elementary school housing more than 1,000 pupils, places the figure at 53.

This argument is not addressed to the proposition that each school should be under the supervisory responsibility of one person but to the implication of the court's order, which refers to "rank of principal or headmaster", that the smallest of schools shall be headed by a person commanding the same grade level and pay as a person who supervises the largest. Subsequent to the court's order, we are informed, the court stated that its intent was simply that there be a "person in charge" of each facility; the level of compensation was left to the School Department and Committee. This seems to us the sensible approach. The district court having clarified the meaning of its order, we see no reason at this juncture to set it aside, but leave the matter to be worked out by the school authorities to the satisfaction of the district court.

e. *The power given to the experts.*

The Committee objects to three orders of the court with re-

spect to its experts.

The May 10 order promulgating the court-developed desegregation plan provided that the assignment of students be carried out "under the supervision of representatives of the court". The memorandum of decision on June 5 stated: "The nature of instruction given in the schools must also receive the attention of the court and its representatives. Instruction must be non-discriminatory and avoid racial stereotyping." 401 F. Supp. at 234. We see nothing unusual in these orders. Experts are commonly used to assist the court in planning desegregation, *see generally Hart* v. *Community School Board of Brooklyn*, 383 F. Supp. 699, 764-67 (E.D. N.Y. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975), and under the circumstances of this case were justifiably used to assure implementation as well. It is regrettable that there was a need to closely monitor the assignment process, but it is the Committee's own doing. To have neglected it, or to have failed to assure that instruction was non-discriminatory would have been irresponsible of the court.

The June 20 order was a response to a delayed School Committee proposal about certain of the guidelines which needed to be settled before the student assignment process could begin. The proposal conflicted substantively with the court's previous orders in several respects, and advanced positions which (also contrary to court orders) had not been discussed with the court's experts. Operating under serious time pressure to effectuate the desegregation plan smoothly for the fall, the court "authorized the court-appointed experts to resolve forthwith the remaining issues with respect to facilities utilization, program allocation and enrollment units. The court will as soon as feasible review with the court-appointed experts their determination of these remaining issues . . . ." While this order perhaps gave the experts an unusual, if brief, amount of power, it was justified

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by the School Committee's actual violations of the court's substantive and procedural orders, and its unwarranted delay in the face of the urgent necessity of finalizing these decisions. The court specifically found that absent this order "the student assignment process would be stalled and the implementation of the May 10 plan be jeopardized." Along with the provisions for immediate court review, this order was proper under the circumstances.

Moreover, all of the duties specifically provided for in these three orders having now been substantially performed, the only active controversy remaining under this heading probably is the continued existence of the experts themselves. The Committee urges that their function is completed, and that they "should now return to their university." We agree that this will be appropriate once a unitary school system has been established, and perhaps even earlier in the court's discretion. The speed with which this goal is accomplished, however, rests in large measure in the hands of the Committee itself. We note that a new Committee was elected in November; it is our hope that the new majority will be more constructive than the old. If so, the court measures discussed in this section, many of them undoubtedly aggravating, may cease to be necessary.

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We therefore affirm the District Court's plan and implementation order for Phase II.

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B. Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 75-1184.

TALLULAH MORGAN ET AL.,
Plaintiffs, Appellees,
v.
JOHN J. KERRIGAN ET AL.,
Defendants, Appellees,

BOSTON HOME AND SCHOOL ASSOCIATION,
Defendant-Intervenor, Appellant.

No. 75-1194.

TALLULAH MORGAN ET AL.,
Plaintiffs, Appellees,
v.
JOHN J. KERRIGAN ET AL.,
Defendants, Appellants.

No. 75-1197.

TALLULAH MORGAN ET AL.,
Plaintiffs, Appellees,
v.
JOHN J. KERRIGAN ET AL.,
Defendants, Appellants.

No. 75-1212.

TALLULAH MORGAN ET AL.,
Plaintiffs, Appellees,
v.
JOHN J. KERRIGAN ET AL.,
Defendants, Appellees,

KEVIN H. WHITE ETC., ET AL.,
Defendants, Appellants.

JUDGMENT

Entered January 14, 1976

This cause came on to be heard on appeals from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The orders of the District Court entered May 2, May 10, and June 5, 1975, are affirmed.

The plaintiffs and the Massachusetts Board of Education are to submit statements of costs for reproducing their respective briefs, and all parties are to submit statements for their respective costs, if any, for reproducing the appendix.

By the Court:

Dana H. Hallips

Clerk.

[cc: Messrs. Moloney, Fremont-Smith, Wise, Connolly, Leubsdorf, Miller]

C. Opinion of the District Court

Tallulah MORGAN et al., Plaintiffs,

v.

John J. KERRIGAN et al., Defendants.

Civ. A. No. 72-911-G.

United States District Court,
D. Massachusetts.

June 5, 1975.

Black parents and their children brought action to require desegregation of city schools. After finding the schools to be unconstitutionally segregated, the District Court, Garrity, J., ordered desegregation plan which involved creation of community school districts, citywide magnet schools, pairing of schools with colleges and business and civic organizations in the city, elimination of racially identifiable schools, crea-

tion of racial-ethnic parent and student councils, and the closing of some schools.

Order accordingly.

Stay denied, 1 Cir., —— F.2d ——.

1. Schools and School Districts ⇐13

Any plan which places complete reliance on parental choice to desegregate schools cannot be constitutionally adopted where there are more effective methods of desegregation which are reasonably available.

2. Schools and School Districts ⇐13

Integrated experience provided at enrichment centers which students would attend for three weeks on a half day basis to intermingle with other ethnic groups while engaging in special programs is no substitute for a desegregated education and provision for such a center in an otherwise totally unacceptable desegregation plan does not make the plan acceptable.

3. Schools and School Districts ⇐13

Education is a matter entrusted initially to elected local authorities and appointed state authorities and, even after unlawful segregation has been found, responsibility falls initially upon the local school authorities to remedy the effects of segregation.

4. Schools and School Districts ⇐13

In attempting to eliminate segregation in school system, all schools in the system need not show the same or nearly the same ethnic composition; rather, the remedy should eliminate assignment patterns which leave some schools so disproportionate in their ethnic makeup that they are in effect "Negro" or "white" schools and the remedy should also eliminate conditions likely to produce such school composition in the future.

5. Schools and School Districts ⇐13

Where school system had been found to be segregated, school committee would be forbidden to take any further actions affirmatively discriminating against minority students on basis of race.

6. Schools and School Districts ⇐151

Minority group students may not be excluded from public school programs or activities on the basis of race, either directly or indirectly.

7. Schools and School Districts ⇐151

Where student assignment policies which ignore race would perpetuate the effects of past segregative practices, desegregation remedy must offer more than superficial neutrality; it must meet and neutralize the effects of past discrimination.

8. Schools and School Districts ⇐13

School desegregation plan is to be judged by its effectiveness.

9. Schools and School Districts ⇐13

When a history of segregation, followed by default of local school authorities in planning desegregation, forces the court to fashion a remedy, it is within the equitable authority of the court to use ratios as a starting point in formulating a remedy.

10. Schools and School Districts ⇐13

Although no uniform degree of racial mixing of students is required in order to end segregated schools and counter the pervasive effects of years of segregatory practices, awareness of the racial composition of the system as a whole provides a reference for determining what are racially identifiable schools within that system; test of identifiability becomes substantial disproportion in composition compared to the racial composition of the school system.

11. Schools and School Districts ⇐13

School desegregation plan may properly leave some schools all or predominantly of one race where such composition can be shown to result from nondiscriminatory considerations.

12. Schools and School Districts ⇐13

Identifiably one race schools in a school system inflict two sorts of injury upon minority students, i. e., the affrontery likely to be felt from racial or ethnic isolation, and the cutting off from majority culture, which is widely reflected in the standards which determine success in society, of minority students.

13. Schools and School Districts ⇐13

Small variations in racial or ethnic composition of schools do not make them racially identifiable nor diminish substantially the degree of actual desegregation.

14. Schools and School Districts ⇐13

Desirability of minimizing "forced busing," i. e., assignments to school beyond walking distance, is a legitimate concern entitled to weight in fashioning a remedy to eliminate segregation in school system.

See publication Words and Phrases for other judicial constructions and definitions.

15. Schools and School Districts ⇐13

Educational concerns may effect the form of remedy imposed to eliminate segregation in school system.

16. Schools and School Districts ⇐13

Neither the prospect of "white flight" from the city to the suburbs nor the prospect of resistance to desegregation constitute practicalities which can be weighed against the rights of minority group students in fashioning remedy for segregation in public school system.

17. Schools and School Districts ⇐154

Reassignment of students to eliminate segregation is one means to the end of providing equal opportunity in education.

18. Schools and School Districts ⇐13

In order to assure that a responsible administration would be available to assure that desegregation plan ordered by court was carried out effectively, and in order to prevent some schools from lagging behind others, court plan would provide for district superintendents, councils of principals within each district, and a principal or head master at each school.

19. Schools and School Districts ⇐13

Nature of instruction given in desegregated schools must receive the attention of the court in creating remedy for segregation; instruction must be nondiscriminatory and must avoid racial stereotyping.

20. Schools and School Districts ⇐13

Plan for desegregating public school system would provide for development of magnet program so that desegregation could, as far as possible, occur through voluntary choices.

21. Schools and School Districts ⇐13

In order to develop true magnet schools with programs distinctive and attractive enough to draw ample applications to aid in desegregation process through voluntary choice, court-ordered desegregation plan would call upon the expert aid of colleges and universities and of the city's business and cultural communities to work with the magnet schools and to help each magnet school build its special emphasis.

22. Schools and School Districts ⇐13

In drawing line for community school districts within city, court, in attempting to eliminate segregation, would draw the lines to create communities of schools, serving a defined body of students from kindergarten through grade thirteen, rather than drawing lines to reflect concepts of communities as ethnic or racial neighborhoods.

23. Schools and School Districts ⇐13

Large disparities in the racial composition of districts within a school system may endanger desegregation and court, in fashioning desegregation remedy, has an obligation to seek a plan

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which offers hope of lasting desegregation.

24. Schools and School Districts ⇐13

In order to provide reasonable possibility of lasting desegregation, school district lines within school system would be drawn so as to produce districts which, with one exception, resemble adjacent districts in racial composition.

25. Schools and School Districts ⇐13

School districts created by court desegregation plan would be drawn so as to avoid the need to deny students entry into citywide schools because of their race and district of residence; desegregation achieved within a district school should not be lost by permitting admissions to a citywide school without regard to the district's racial composition.

26. Schools and School Districts ⇐13

Where, to desegregate schools within one particular section of the city, between four and five thousand children would have to be transported, many through tunnels at heavy traffic hours for distances of up to 5.2 miles, and where schools within the area would be subject to some desegregation in any event, court would adopt plan which left schools in the area predominantly white; such treatment of the area did not deprive minority group students of full vindication of their constitutional rights as there would still be no segregated, predominantly black schools under the plan.

27. Schools and School Districts ⇐154

In developing desegregation plan, court's goals in assigning students to schools would be to make sure that schools were not identifiably one race and to assure that no racial or ethnic group, black, white, or other minority, was disproportionately isolated in any school.

28. Schools and School Districts ⇐154

In assigning students to community district schools in order to effectuate desegregation, assignment, rather than being made by individual or address, would be made on basis of "geocode," several block areas into which school department had divided the city for planning purposes, in order to make assignment more rapidly and to allow students to attend schools with their neighbors, even though some black children residing in a geocode in which most students were white might be assigned for desegregation to a school in a black area.

29. Schools and School Districts ⇐154

Once racially identifiable schools have been eliminated, two primary concerns in fashioning desegregation plan are the desire to allow students to attend schools near their homes and desire to minimize any sense of isolation which students, white, black, or other minority, might feel.

30. Schools and School Districts ⇐13

Court's desegregation plan would take account of minority students other than black and would not simply aggregate the other minority students, such as Hispanic and Oriental students, with black students in prescribing school composition limits.

31. Schools and School Districts ⇐154

In fashioning desegregation plan, bilingual students would be assigned before others in order to prevent excessive dispersal and thus permit the clustering of bilingual classes. M.G.L.A. c. 71A § 1 et seq.; Civil Rights Act of 1964, § 601, 42 U.S.C.A. § 2000d.

32. Schools and School Districts ⇐13

Since introduction of new students at every grade at three examination schools, particularly two which had six-year programs, could seriously effect the programs at the schools and leave the students entering at particular grades without prior years' preparation needed to keep pace and fully benefit from the programs, desegregation program would permit desegregation of only the entering grades rather than desegregation of all grades at once.

33. Schools and School Districts ⇐13

In view of segregated history of public school system at elementary school level, and in particular segregation existing in advanced work classes which successfully feed children into three examination schools, any use of an arbitrarily selected SSAT examination score cut off which would prevent desegregation of the examination schools would not be permitted in connection with desegregation plan; school department would be permitted to use grades and test scores as it deemed appropriate to obtain desegregated entering classes at the schools.

34. Schools and School Districts ⇐13

In view of possibility that desegregation of three examination schools might not be obtained by integration only of children entering at the seventh and eighth grades, court would retain jurisdiction regarding proposals for elimination of grades seven and eight at examination schools addition of grade six to the schools, or other changes in grade structure.

35. Schools and School Districts ⇐13

School closings in connection with desegregation plan would be ordered on basis of excess seating capacity for the number of students who would use the schools in connection with desegregation plan and on the basis of the quality of the facilities.

36. Schools and School Districts ⇐13

If overcrowding or other problems due to inadequate space should develop under court ordered desegregation plan, such problems could not be solved by using unsuitable space such as hallways, utility rooms, auditoriums and the like; if required, one or more schools ordered to be closed by the plan could be reopened.

37. Schools and School Districts ⇐13

In connection with court-ordered desegregation plan, court would establish racial-ethnic parent and student councils at schools to deal with racial tensions and problems at the individual school level and a citywide parents' advisory council to coordinate activities and disseminate information among the various parent and student councils at the individual schools.

38. Schools and School Districts ⇐13

In order to keep court informed of progress of court-ordered desegregation in school system, superintendent would be required to file annual reports.

39. School and School Districts ⇐13, 175

No teacher or school administrator in a citywide school would permitted, under desegregation plan, to remand a student to a district school as unsuitable for the citywide school or as punishment; neither could schools in any community district develop alternative programs which operate de facto as preventive detention or short term segregation facilities.

40. Schools and School Districts ⇐164

In connection with court ordered school desegregation plan, school department would be required to provide bilingual instruction where 20 or more kindergarten students attending a school were found to be in need of such instruction.

41. Schools and School Districts ⇐154

Under court-ordered desegregation plan, every school facility would be required to receive and educate mild and moderate special needs students who would be assigned to schools in accordance with regular assignment procedure under the plan.

42. Schools and School Districts ⇐13

In connection with court-ordered desegregation plan, which mandated creation of citywide schools and community school districts, school department would be required to prepare an orientation and application booklet, which should be printed for mailing in an English and Spanish version and in a Chinese version, and which also should be available in translations into French, Greek, Italian and Portuguese to explain to parents and students the options available under the plan.

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43. Schools and School Districts ⇐154

Under court-ordered desegregation plan which resulted in creation of city-wide schools and community school districts within the city, parents of each prospective student would be asked to indicate preference among school assignments; for elementary and middle school students, parents would be asked to rank up to three preferences from among the citywide schools and a community district assignment, with assignment to community district school guaranteed at elementary and middle school levels for students who preferred such an assignment or who indicated no preference.

44. Schools and School Districts ⇐154

Under court ordered desegregation plan which involved assignment of students based on "geocode" within which they lived, each community district school would have assigned to it the geocodes which lay within the district so that each school's racial and ethnic composition would generally reflect the percentages of white, black and other minority students, kindergarten through grade 13, who resided in the district.

45. Schools and School Districts ⇐13

For purposes of determining extent to which community school district schools could deviate from racial makeup of the district in order to make allowances for geographical obstacles, seat capacities, transportation route, and minimization of mandatory busing, percentage of particular ethnic group within the district would be multiplied by 25%; in district in which white students made up 44% of the public schoolage population, permissible variation would be 11 percentage points so that, although desired norm would be 44%, white student population of schools could range between 33 and 55%.

46. Schools and School Districts ⇐13

Deviation of racial composition of citywide schools vis-a-vis system wide percentages, which were projected at 51% white, would be limited to five percentage points, thus allowing a range of white percentage of 46 to 56%.

47. Schools and School Districts ⇐159½

Adequate remedy for segregation in Boston school system required mandatory transportation of students as, assignment of every student to school closest or next closest to his residence, considering only school capacity, natural and physical barriers, or both, along with grade level and type of education provided, could not achieve substantial desegregation in Boston due to the geography of the city and racial and ethnic distribution in the city. 22 U.S.C.A. §§ 1702, 1713, 1714, 1755.

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MEMORANDUM OF DECISION AND REMEDIAL ORDERS

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GARRITY, District Judge.

Introduction [1]

Boston has been a magnet for people searching for access to the larger American society ever since the founding of the nation. Boston's magnetism has, in recent decades, attracted thousands of black Americans, Hispanic Americans, and Oriental Americans into its midst. Like those who preceded them from Europe, these Americans are being pushed by the hardships of their present life and pulled by the promise of opportunities that Boston has always represented.

Many Bostonians today face a different situation from the one faced by settlers in earlier generations, however. Many of today's Bostonians, white, black, and other minorities, must bridge a cultural gap far wider than the one bridged by their predecessors.

Hard as the bridge to opportunity was to travel for most Bostonians from 1800 to 1946, the bridge did exist. Growing industries were in search of workers. The physical structure of Boston permitted the incoming ethnic groups, albeit after much struggle, to settle in enclaves within a city that was not yet overbuilt. Of equal importance, free public schools served as an open road across the gulf between the old cultures and the new. Public schools also provided,

1. This introduction has been taken almost verbatim from the report of the masters filed March 31, 1975.

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through their instruction, access to semi-skilled and skilled occupations.

Building upon a foundation laid in the colonial era, Boston became the bridge not only to liberty, but to the ideal of the free, universal, and inclusive public school. Horace Mann established in 1837 the nation's first statewide education commission. In that decade, he achieved world wide renown as the Father of the Common School. Under his stimulus, Boston erected the Quincy School, still in use today in Boston, as the nation's first multi-classroom public elementary school. Built in 1847, the Quincy School expressed in brick and mortar as well as program all that was ideal, urban, and progressive in the nineteenth century vision of the Common School.

Horace Mann's vision served the children and youth of Boston for more than a century. But, as the deterioration and segregation of the Quincy School make plain to the eye of any visitor, that vision began to dim after World War II. Public schools and school services became increasingly unequal in quality. Some became exclusive rather than inclusive of all groups.

Ethnic segregation, cultural isolation, overcrowding some schools and extreme underutilization in others, incoherent grade structures, discriminatory assignments and school admissions procedures, all combined to guarantee unequal and inferior educational opportunities for the children of Boston. By the late 1960's conditions had become so deplorable that one responsible investigator reported,

> Of any generation of seventh graders, 85 percent *do not* complete four years of college; 75 percent do not even begin college. In any ghetto area, more than half never finish high school.[2]

As the public schools of Boston declined, they also became outmoded. Speaking of them, the Harrington Report concluded, "Course offerings available to most public school students today are similar to those in the schools of their parents and grandparents."[3] In the last few years, the Boston School Department has worked to introduce some innovations and improvements, but these have been handicapped by maneuvers to maintain segregation.

This demise over a period of three decades took place alongside the rising hunger of Bostonians for schools that could help them bridge the gap between ethnic isolation and access to the larger and ever more complex urban society. The children of second and third generation white ethnic families suffered as the schools located within their residential enclaves came to reinforce rather than reduce the educational distance between their neighborhood and access to the larger society. Black and other minority children, meanwhile, suffered even greater educational deprivations as the schools they attended were the most crowded, the oldest, the least well maintained, and the most poorly staffed that the school committee could offer.

In the court's quest for a remedy adequate to reviving the vision of an equitable and effective public school system, it has planned for schools that will be free, universal, inclusive, and sound in ways that meet the educational needs and aspirations of all of Boston's citizens. It believes that the reconstruction of the ideal of the Common School requires a common concern with equality and excellence throughout all institutions and groups in the entire Greater Boston area.

While it has obligated the Boston School Committee and its Department to eliminate segregation and the effects of discrimination in the public schools, it has also solicited the talent, support, and assistance of colleges, universities, and business and other organizations in de-

2. Peter Schrag, *Village School Downtown*, (1967).

3. Willis—Harrington Commission.

veloping learning opportunities that will remedy the losses students have already suffered and that will lay a basis for improving the quality of education for the total City.

II

Prior Proceedings

On June 21, 1974 the court issued an opinion holding that Boston's public schools had been unconstitutionally segregated by the purposeful actions of the school committee and superintendent. *Morgan v. Hennigan*, D.Mass.1974, 379 F.Supp. 410. This finding was affirmed by the Court of Appeals in December of 1974. *Morgan v. Kerrigan*, 1 Cir. 1974, 509 F.2d 580. The finding was based on a history of school committee actions and inactions spanning a decade, involving overcrowding and underutilization of facilities, placement of portable classrooms, use of new facilities, districting, feeder patterns, open enrollment policies, and hiring and assignment of faculty and staff, which intentionally brought about and maintained a dual school system in Boston. In 1971–72 the system contained 59,300 whites (61%) and 30,600 blacks (32%), yet only five of 140 elementary schools had a racial composition that came within 10% of the citywide ratio. Eight-four percent of white students in Boston attended schools more than 80% white; 62% of black students attended schools more than 70% black. 379 F.Supp. at 424. Added to the background of this case were efforts by the school committee beginning in 1965 to evade the effects of the Racial Imbalance Act passed by the Massachusetts legislature. Mass.G.L. c. 71, §§ 37C and 37D, and c. 15, §§ 1*I*, 1J and 1K. Following an unsuccessful attack by the Boston School Committee on the constitutionality of the statute, a series of orders of the State Board of Education and judicial proceedings in state courts culminated in orders from the Supreme Judicial Court that the school committee implement in the 1974–75 school year a plan formulated by the State Board of Education (the "state plan").

In the court's opinion of June 21, 1974 the defendants Boston School Committee and Superintendent (the "city defendants") were found to have "knowingly carried out a systematic program of segregation affecting all of the city's students, teachers and school facilities and have intentionally brought about and maintained a dual school system." 379 F.Supp. 410, 482. The court ordered these defendants to "begin forthwith the formulation and implementation of plans which shall eliminate every form of racial segregation in the public schools of Boston, including all consequences and vestiges of segregregation previously practiced by the defendants." 379 F. Supp. at 484. As an interlocutory order, the court enjoined the defendant school committee and superintendent from failing to comply with the state plan.

In July 1974 the school committee and superintendent, dissatisfied with the state plan, requested time in which to prepare a substitute plan which would accomplish desegregation in two stages, secondary schools in September 1974 and elementary schools in September 1975. The court granted time until July 29. At the end of this period, the defendants reported that they had been unable to develop a satisfactory substitute for the state plan, and the efforts of the court and parties turned to the implementation of the state plan. The state plan is only a partial plan in terms of the constitutional requirements of this case. Drawn under constraints of state law regarding assignments, it sought to decrease the number of racially imbalanced schools, i. e., having a majority of nonwhite students, from 68 to 44. It left large areas of the city such as Charlestown and East Boston unaffected and permitted the continuation of a number of virtually all black middle and elementary schools.

The opening of school under the state plan in September of 1974 was accompa-

nied by some violence and much fear. School buses were stoned, their windows broken and some children cut by shattered glass. Angry crowds of white parents and students gathered in front of schools to protest the entry of black students assigned there. Student boycotts of varying effectiveness were organized. Many students stayed home or were kept home by their parents out of fear for their personal safety. Several city high schools were the scenes of racially-connected fights and incidents. As the school year continued, violence subsided, then recurred. The court and the parties took several steps in an effort to provide security and reduce racial tensions. Racial-ethnic councils of parents and students were established. In October federal marshals were requested by the Mayor, but it developed that such assistance was available at the federal level only after city and state resources were exhausted. State troopers joined city police in large numbers in troubled areas, such as predominantly white South Boston and Hyde Park. Even today 166 state and local police officers are stationed in the halls of South Boston High School and another 134 are stationed in the vicinity during school hours. In December a white student was stabbed inside South Boston High School by a black student. Community residents gathered and surrounded the high school building, trapping black students inside until a decoy operation by police permitted the departure of the black students. In the aftermath of this incident, all schools in the South Boston-Roxbury district were closed early for the Christmas vacation and reopened late, and then only against advice of city and state police officials who urged the permanent closing of South Boston High. The court issued orders designed to keep crowds from gathering along bus routes and around school buildings, and to keep non-students out of school buildings during class hours. The student code of discipline was amended to prohibit the use of racial epithets to antagonize others. The parties developed alternative plans for students at South Boston High should its permanent closing have become necessary. A monitoring program was developed by the Community Relations Service of the United States Department of Justice, under which volunteers have been stationed in troubled schools to watch for signs of increasing tension.

In many schools this year the atmosphere has been one of felt tension, where the educational process has suffered. In others, notably at the middle and elementary school levels, but also at some high schools, students and teachers have gone about the business of learning and have developed integrated learning programs of which they are proud.

As these events were occurring, planning was renewed for the development of a citywide desegregation plan to be implemented in September 1975. After several hearings on proposals of the parties as to its terms, the court entered an order on October 31, 1974 establishing the filing date and general contents of a student desegregation plan to be filed by the defendants. This order required the filing of progress reports on the development of the plan and filing of the plan itself by December 16, 1974. It also stated that "the plan shall be approved by vote of the defendant school committee before submission to the court." In setting standards for the plan, the court said:

> Taking into account the safety of students and the practicalities of the situation, the student desegregation plan shall provide for the greatest possible degree of actual desegregation of all grades in all schools in all parts of the city. In drafting the plan, the defendants shall utilize as a starting point and keep in mind the goal that the racial composition of the student body of every school should generally reflect the ratios of white and black students enrolled at that grade level of schools, elementary, intermediate and secondary, throughout the system.

The order provided that parties and other interested community groups would have until January 20, 1975 to file criticisms of the school committee plan or to file alternative plans.

Progress reports were duly filed by the defendants, but on the deadline for filing its plan, December 16, the school committee by a three to two vote refused to approve for filing with the court the plan developed by the school department at the school committee's direction and about which the progress reports had been made. Counsel for the defendants filed the plan (known as "the December 16 plan") despite the school committee vote, then asked the court's permission, granted when new counsel was later obtained, to withdraw from the case.

Plaintiffs filed motions that the three members of the school committee voting against submission of the December 16 plan be held in criminal and civil contempt. In preparation for the hearing on these motions, the court required written answers from these three school committee members to questions about their willingness to obey future orders of the court and their willingness to take affirmative steps to decrease racial tensions and peacefully implement the state plan. In every case the members stated that they would obey orders by the court but would take no other steps except where they deemed actions would reduce racial antagonism and provide adequate safety for the school children. The questions and the then chairman Kerrigan's answers, which were typical, appear as Appendix A. At hearing on the contempt motions the members testified that their votes had been based on conscientious opposition to any form of "forced busing," i. e., assignments to schools beyond walking distance, which made them unable to endorse any desegregation plan containing forced busing. This view was adhered to even though there might be no desegregation without mandatory busing. The then chairman Kerrigan testified as follows:

> I certainly am against the forced busing of school children. I have always been against the forced busing of school children. I ran for office stating that I would never vote for a plan that involved the busing of school children. It is unfortunate that is the way our society exists, the way the housing patterns are laid out, but the only way you are going to desegregate city schools is through forced busing.
>
> I certainly could go for magnet schools. I certainly could go for an increase in the METCO program. I could go for any plan that would give the parents whom I represent a choice of the school. I can't vote for a plan that includes the forced busing of school children. The hypocrisy in that statement is there is no way that it can be done without the forced busing of children.

The court denied the motions for criminal contempt but held the three committeemen in civil contempt of the October 31 order. In order to continue the planning process, however, the court directed the parties to file critiques and alternatives to the December 16 plan, unsponsored though it was. On December 30 the court outlined sanctions to begin January 9, 1975 which could be avoided or purged by a vote to authorize the submission of a student desegregation plan. On January 7, after applications for a stay of sanctions were denied by this court and by the Court of Appeals, the school committee voted to direct the school department to draw up a desegregation plan without forced busing and to authorize the submission to the court of that plan. The court found that the three committeemen had thereby purged themselves of civil contempt provided the plan was authorized and filed by January 20, later extended to January 27. The school committee did authorize and file a plan on January 27.

An alternative plan was filed on January 20 by the plaintiffs, along with criticisms of the December 16 plan by parties including the state defendants, the

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Mayor and Public Facilities Department, the Boston Teachers Union, as well as numerous community groups and individuals. El Comite de Padres Pro Defensa de la Educacion Bilingue (hereinafter referred to as "El Comite") was permitted to intervene on behalf of the Hispanic children and parents and also filed comments on the various submissions. The parties then filed comments on each other's submissions to clarify points of disagreement.

The Home and School Association, comprising chapters of parents, was permitted to intervene on the question of the student desegregation remedy and filed a plan and supporting memoranda which the court treated as a motion to modify its October 31 order. The association attempted to show that certain segregated schools had not been affected by defendants' actions and therefore were not required to be desegregated in formulating a remedy. The association argued that even within an admittedly dual school system, the remedy should reach only those schools in the system as to which specific findings as to the effect of segregative actions had been made. The court held a separate hearing on February 5, rejected the association's motion and refused to allow further consideration of its plan.

The court determined that because of the complexity and multiplicity of the school desegregation plans and proposals filed, the use of a panel of masters to hold evidentiary hearings and make recommendations on a desegregation plan to the court was advisable. On January 31, the court appointed two experts, Dr. Robert A. Dentler, Dean of the Boston University School of Education, and Dr. Marvin B. Scott, Associate Dean of the same school, to assist the masters and the court in the task of adopting a student desegregation plan for September 1975.

In an order on February 7, the court formally appointed a panel of four masters (they had been designated on February 5 to allow parties to object to their identity and to terms of the proposed order of reference): retired Supreme Judicial Court Justice Jacob J. Spiegel, who presided at the hearings; former United States Commissioner of Education Francis Keppel; former state Attorney General Edward J. McCormack, Jr.; and Professor of Education at Harvard University Dr. Charles V. Willie. The masters held two weeks of evidentiary hearings, beginning February 10. On March 31, after having heard the parties' comments on their draft report, the masters filed their final report with the court which recommended a plan prepared by them incorporating elements of the plans submitted by the parties and proposals of their own. The parties then filed objections to the masters' report. After hearings on these objections, and on objections to modifications proposed by the court after examination by its experts of updated data furnished on April 10 by the school department, the court decided upon the modified version of the plan recommended by the masters which is established by the remedial orders herein promulgated.

III

Findings and Conclusions

The findings of fact and conclusions of law that follow constitute many but by no means all of the factual and legal underpinnings of the court's student desegregation plan and related remedial orders. Numerous findings descriptive of the Boston public school system, its facilities, student body, curriculum, administration and the like, appear in the plan itself. Also, the transcripts of several hearings in open court on the remedial aspects of the case contain many oral findings and rulings by the court which are pertinent. This memorandum of decision deals mainly with the reasons for particular features of the desegregation plan that have been of major concern to the parties.

A.

Plans Submitted by Parties

The plan submitted by the school committee on January 27, 1975 was constitutionally inadequate because it did not promise realistically to desegregate the public schools. It proposed a phased assignment process based on choices by parents and students among a series of options. The assignment process would require a period of up to seven weeks and up to five communications between the school department and the individual parent or student who would be allowed but one week in which to respond to each communication. Magnet programs in citywide and zonal schools would be open on a desegregated basis only, but the ultimate composition of the majority of schools in a zone would be determined by parental choice. For schools which remained "racially isolated", defined by the school department as more than 15% beyond the racial ratio of the zone at that level, as a result of parent and student choices, the plan provided for mandatory participation of students at those schools at desegregated "third-site Resource Centers" one day a week for elementary schools and one day every two weeks for middle schools.

[1] As pointed out by the masters, any plan that places complete reliance on parental choice to desegregate Boston's schools cannot be constitutionally adopted. Such plans must be rejected where, as here, there are more effective methods of desegregation reasonably available. *Green v. School Board of New Kent County*, 1968, 391 U.S. 430, 88 S. Ct. 1689, 20 L.Ed.2d 716. Complete freedom-of-choice plans have a long history of failing in many cases when adopted to result in desegregation. E. g., *Green v. School Board of New Kent County, supra; Monroe v. Board of Commissioners*, 1968, 391 U.S. 450, 88 S.Ct. 1700, 20 L.Ed.2d 733; *Hall v. St. Helena Parish School Bd.*, 5 Cir. 1969, 417 F.2d 801; *United States v. Jefferson County Board of Education*, 5 Cir. 1969, 417 F.2d 834.

We need not rely on experience elsewhere, however, to predict the ineffectiveness of such a plan in Boston. Boston's own experience with open enrollments, feeder patterns and options, and the opening of the Hennigan and Lee schools, set out in detail in the court's June 21 opinion, *Morgan v. Hennigan, supra*, at 430–441–56, shows the segregative effects that have occurred under such options in Boston and which in all likelihood would occur again if the school committee plan were to be adopted.

Certainly there have been some magnet programs in Boston, such as the model demonstration subsystem elementary program at the Trotter School, that have achieved integrated enrollments through volunteer applications. To the extent that desegregation in Boston can be achieved on a voluntary basis, the court endorses the concept and incorporates it into the plan adopted. But to disregard the history of desegregation efforts throughout the country and in Boston as the school committee urges we do by adopting its proposal on a trial basis would be to place the realization of the rights of Boston's black students in a vessel that would begin its voyage rudderless against the wind.

[2] The addition of "third-site resource center" experiences does not save the school committee plan from its otherwise total and therefore unacceptable reliance on voluntary choices to produce desegregation. An integrated experience is no substitute for a desegregated education. The court agrees with Judge Doyle in Denver, who stated, when faced with a similar proposal,

> The special education programs which are suggested involving the enrichment offerings together with the open school concept and the special programs designed for use in segregated schools are desirable, but the emphasis is on enriched education and can

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scarcely be considered a plan for desegregation. Thus, the transporting of students from concentrated schools to enrichment centers for three weeks on a half day basis to intermingle with other ethnic groups while engaging in special programs does not pretend to be a desegregation plan. It impresses us, on the contrary, as a plan which is more designed to avoid adoption of a desegregation plan.

Keyes v. School District No. 1, Denver, D.Colo.1974, 380 F.Supp. 673, 682. See also *United States v. Texas Educ. Agency*, 5 Cir. 1972, 467 F.2d 848; *United States v. Board of Educ. of Webster County*, 5 Cir. 1970, 431 F.2d 59; *Dowell v. Board of Educ. of Oklahoma City*, W.D.Okla.1972, 338 F.Supp. 1256, aff'd, 10 Cir. 1972, 465 F.2d 1012, cert. denied, 409 U.S. 1041, 93 S.Ct. 526, 34 L.Ed.2d 490; *Spangler v. Pasadena City Board of Educ.*, C.D.Cal.1974, 375 F.Supp. 1304.

The school committee plan presented no more than a hope for desegregation in Boston. The proposed assignment process promised an administrative nightmare, contemplating a seven-week-long individualized assignment process for over 80,000 children. Ultimately it failed to do what the school committee hoped it would, viz., avoid "forced busing", since it required mandatory transportation of students to resource centers for desegregation purposes. For these reasons and those set out in the Masters' Report in Part I, pp. 9-16, the court adopts their recommendation and holds the school committee plan to be constitutionally inadequate.

Added to the inadequacy of the school committee plan is a history of the committee's failing, when granted time by the court, to file promised plans. The promised Option A alternatives to the state court plan last July were filed but not approved by the Boston School Committee. The time granted from September, when a filing date was established, to December 16, resulted in the committee's repudiation of the plan developed by its school department staff. The month of January was granted for formulation of a plan that failed to promise substantial desegregation. Now, approximately three months before school is due to open in September, time does not permit another court request to the school committee to produce yet another desegregation plan. Under the circumstances the court has no alternative but to take the initiative in devising a desegregation plan. "In default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system." *Swann, infra*, 402 U.S. at 16, 91 S.Ct. at 1276.

The masters have, in accordance with the court's order of reference, analyzed and considered the plan filed by the plaintiffs and the plan, repudiated by the school committee, which was filed on December 16 with the court. For the reasons stated by the masters in Part I, pp. 17-28 of their report filed March 31, 1975, and because the court finds the plan proposed by the masters with revisions ordered by the court to be preferable for reasons of feasibility, the court declines to adopt either the plaintiffs' proposed plan or the December 16 proposed plan.

B.

General Principles Governing Remedy

In making its findings as to plans submitted by the parties and in deciding upon the remedial orders herein promulgated the court has observed and relied upon the legal principles which are set forth under the subheadings which follow.

Basis of Court's Power and Duty

[3] The power of the court to order desegregation arises out of the court's finding in June 1974 that the plaintiffs have been discriminated against because of their race and denied equal educational opportunity through intentional segregation. The court is obliged, as it is

empowered, to remedy this wrong. An abiding concern must be to assure that minority students are afforded equal educational opportunity. The plan which the court adopts as a remedy in this case does not rest on any supposed constitutional right of a student to attend a school that has a particular ethnic composition, or whose ethnic composition matches that of the school system as a whole. *Swann v. Charlotte-Mecklenburg Board of Education*, 1971, 402 U.S. 1, 16, 24, 91 S.Ct. 1267, 28 L.Ed.2d 554; *Milliken v. Bradley*, 1974, 418 U.S. 717, 741, 94 S.Ct. 3112, 41 L.Ed.2d 1069 n. 19. Nor does the plan reflect any imagined independent constitutional power of the court to decide what educational policies are desirable for the public school system of the City of Boston. Education is a matter entrusted initially to elected local authorities and appointed state authorities. Even after unlawful segregation has been found, responsibility falls initially upon the local school authorities to remedy the effects of this segregation. *Brown v. Board of Education*, 1955, 349 U.S. 294, 299, 75 S.Ct. 753, 99 L.Ed. 1083 ("Brown II"); *Swann, supra*, 402 U.S. at 16, 91 S.Ct. 1267. Only the default of the school committee in this case has obliged the court to employ the help of the appointed experts and masters and to draw an adequate plan.

[4] The goal of the court in formulating a remedy for intentional segregation of the schools is to eliminate government-imposed isolation of blacks within the school system. Largely as a result of school committee actions, most students in Boston attend schools that are either "black" or "white".[4] The remedy in this case must convert this "dual" system to one "without a 'white' school and a 'Negro' school, but just schools." *Green v. County School Board*, 1968, 391 U.S. 430, 442, 88 S.Ct. 1689, 1697, 20 L.Ed.2d 716. This does not mean that all schools in the system must show the same or nearly the same ethnic compositions, but rather that the remedy should eliminate assignment patterns that leave some schools so disproportionate in their ethnic makeup that they are in effect "Negro" or "white" schools—to use the language of *Green*. The remedy also should eliminate conditions likely to produce such school compositions in the future. Exceptional circumstances occasionally can justify exceptions to pursuit of this goal, but the goal remains.

Barring Affirmative Discrimination

[5, 6] The defendant school committee must be forbidden to take any further actions affirmatively discriminating against minority students on the basis of race. An order to this effect appeared in the court's opinion and order entered June 21, 1974. Appendix B. It is upon this central concept that the entire desegregation plan rests: that minority students may not be excluded from public school programs or activities on the basis of race, either directly, as happened more than a century ago, cf. *Roberts v. City of Boston*, 1849, 5 Cush. 198, or indirectly, as has occurred more recently. See *Swann, supra*, 402 U.S. at 23, 91 S.Ct. 1267. The simplicity of the requirement that affirmative acts of discrimination must end does not, however, imply simplicity of enforcement. The consequences of years of segregative practices will be eradicated only with great effort and understanding. During desegregation, inefficiencies and failures of responsiveness that formerly were only troublesome can become intolerable. Therefore, the plan in this case includes means to assure effective administration, e. g., elementary schools must have principals. Cf. *Plaquemines Parish School Board v. United States*, 5 Cir. 1969, 415 F.2d 817, 821 n. 2. The plan calls on community

4. See *Morgan, supra*, 379 F.Supp. at 424–25, setting out enrollment statistics for 1971–72. Even after implementation of a partial desegregation plan in September 1974, continuing segregation is pronounced at the lower grade levels. See attendance statistics cited by the court at the hearing on April 18, 1975, Tr. 45–49.

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districts to develop educational programs suited to the varying needs of students in particular districts. See, e. g., *United States v. Texas*, E.D.Tex.1971, 342 F. Supp. 24, 30–34, aff'd, 5 Cir. 1972, 466 F.2d 518. And help that in other circumstances would be only desirable—the aid, for example, to be provided in this case by the universities and colleges, and by the several citizens' groups—becomes essential. *Cf. United States v. Texas, supra*; and see generally, *Hart v. Community School Board of Brooklyn*, E.D. N.Y.1974, 383 F.Supp. 699, appeal dismissed, 2 Cir. 1974, 497 F.2d 1027. These points are expanded under the subheading, *infra*, entitled "Multiplicity of Measures."

Preventing Continuing Injury

The plaintiffs in this case do not seek a remedy that would compensate them, as a class, for the injury already wrought by the defendants' long-practiced racial discrimination. That injury, of course, is immense.[5] See *Milliken, supra* (White, J., dissenting), 418 U.S. at 779–780, 94 S.Ct. 3112. The desegregation plan that the court orders cannot make the plaintiffs whole, nor for that matter, anyone who has been affected by the racial divisions in this city, which are in part traceable to the defendants' segregative practices. Rather, the remedy must go beyond an order that forbids further acts of affirmative discrimination in order to assure that past discriminatory practices will work no further harm.

[7] Years of segregative manipulation of student assignment, school placement and expansion, and like practices found by the court in this case, present what the Supreme Court has described as "a loaded game board"; applied to such a school system, student assignment policies that ignore race would perpetuate the effects of the past segregative practices. *Swann, supra*, 402 U.S. at 28, 91 S.Ct. 1267. The desegregation remedy in this case therefore must offer more than superficial neutrality. It must meet and neutralize the effects of past discrimination. The Supreme Court repeatedly has stressed this necessity, in requiring that a desegregation remedy do more than give effect to the "free" choices of students and parents, when the effect of these choices is simply to maintain the segregation of schools. See, *Green, supra; Monroe v. Board of Commissioners of the City of Jackson*, 1968, 391 U.S. 450, 88 S.Ct. 1700, 20 L.Ed.2d 733.

The day is past when desegregation is to be achieved through the struggle of a handful of pioneering black students willing to attend a school that is identifiably white. Nor is a simple rule of attendance at the nearest school adequate, when that rule is imposed on a pattern of segregated housing attributable in part to the segregative practices of school authorities. Such a "neutral" geographic attendance arrangement in Boston would sanction a freezing-in of the effects of past discrimination. Long-continued efforts by the school authorities to keep the races apart inevitably are reflected in both residential patterns and school locations and capacities. See *Morgan, supra*, 379 F.Supp. at 470; *Swann, supra*, 402 U.S. at 20–21, 91 S. Ct. 1267; *Keyes v. School District No. 1, Denver, Colo.*, 1973, 413 U.S. 189, 202–03, 93 S.Ct. 2686, 37 L.Ed.2d 548. This is not to say that ethnic and racial housing patterns result entirely from school segregation, but that past school policies would render discriminatory any simple nearest-school policy.[6]

5. It has been suggested that a person denied equal educational opportunity might have a valid claim for money damages against those who denied him this fundamental right. Sugarman, *Accountability Through the Courts . . .*, 82 U.Chi.Schl.Rev. 233 (1974); cf. *Wood v. Strickland*, — U.S. —, 95 S.Ct. 992, 43 L.Ed.2d 214, 1975; *Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, 4 Cir., 517 F.2d 1141.

6. At least during the period covered by the trial testimony, Boston never had a true neighborhood school policy. See in *Morgan*,

[8] A desegregation plan is to be judged by its effectiveness; see *Swann, supra*, 402 U.S. at 25, 91 S.Ct. 1267; *Green, supra*, 391 U.S. at 439, 88 S.Ct. 1689; *Morgan, supra*, 379 F.Supp. at 482.

Eliminating Racially Identifiable Schools

[9, 10] Fundamentally a desegregation plan must eliminate racial identifiability of schools. Once faculty desegregation and facility equalization are under way, and other marks of a school's racial identification have been removed, the critical identifying quality of the school becomes, of course, the ethnic composition of the student body. When a history of segregation, followed by default of local school authorities in planning desegregation, forces the court to fashion a remedy, it is within the equitable authority of the court to use racial ratios as a starting point in formulating a remedy. *Swann, supra*, 402 U.S. at 25, 91 S.Ct. 1267. Boston's school population of nearly 85,000 students is approximately 52% white, 36% black, and 12% other minority. Of course, no uniform degree of racial mixing of students is or could be required in order to end segregated schools and counter the pervasive effects of years of segregatory practices. See *Swann, supra*, 402 U.S. at 24, 91 S.Ct. 1267; *Milliken, supra*, 418 U.S. at 740–41, 94 S.Ct. 3112. But awareness of the racial composition of the system as a whole provides a reference for determining what are racially identifiable schools within that system. The test of identifiability then becomes substantial disproportion in composition compared to the racial composition of the school system. Cf. *Swann, supra*, 402 U.S. at 26, 91 S.Ct. 1267.

[11] A desegregation plan properly may leave some schools all or predominantly of one race where this composition can be shown to result from non-discriminatory considerations. *Swann, supra*, 402 U.S. at 26, 91 S.Ct. 1267. The court's plan in this case leaves some identifiably white schools at the lower grade levels in East Boston. The considerations that support such treatment of these schools are set out *infra* at pp. 238–239.

[12] Identifiably one-race schools in a school system are to be eliminated because of two sorts of injury that may be inflicted on the minority students in such a school system. First, racial or ethnic isolation is likely to be felt as an affront. The one-race identification of the school is a continual reminder of the past exclusionary practices of the school system; practices that, the Supreme Court observed in *Brown*, generate "a feeling of inferiority as to the [children's] status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Brown, supra*, 347 U.S. at 494, 74 S.Ct. at 691. Second, minority students assigned to identifiably minority schools are cut off from the majority culture which is widely reflected in the standards, explicit and implicit, that determine success in our society. See *Brown, supra*, 347 U.S. at 493–94, 74 S.Ct. 686. An individual may decide, of course, that he prefers to avoid the majority culture; but the public school system may not impose that isolation.

This concern is expressed most clearly in the decisions that form the legal foundation on which *Brown* rests: *Sweatt v. Painter*, 1950, 339 U.S. 629, 70 S.Ct. 848, 94 L.Ed. 1114, holding that a black law student must be admitted to the University of Texas law school, and not restricted to a newly-founded law school for blacks, in part because of the value to a future lawyer of contact with the people he later would work with—the predominantly white Texas bar of 1950; and *McLaurin v. Oklahoma State Regents*, 1950, 339 U.S. 637, 70 S.Ct.

supra, 379 F.Supp. at 473–474, the summary of school committee practices found to be "antithetical to a neighborhood school system."

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851, 94 L.Ed. 1149, holding that a black graduate student admitted to a state university was denied equal educational opportunity by regulations designed to isolate him from the white students, impairing "his ability to study, to engage in discussions and exchange views with other students . . . ."

Competing Interests

Inevitably, the court's primary concern in a desegregation case conflicts with other legitimate concerns. The remedy must accommodate these other interests. But the accommodation must reflect the primacy of the need to achieve equal opportunity in education. In its respect for a variety of interests, a desegregation plan resembles other equitable remedies. The Supreme Court has stated concisely a rough guideline for reconciling these interests.

> Having once found a violation, the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation. *Davis v. Board of School Commissioners of Mobile County*, 1971, 402 U.S. 33, 37, 91 S.Ct. 1289, 1292, 28 L.Ed.2d 577.

The task of a court devising a desegregation plan, then, is to give content to the broad concept, "the practicalities . . .", while at the same time making "every effort to achieve the greatest possible degree of actual desegregation."

[13] A variety of factors require that school ethnic compositions vary in various parts of the school system. Small variations in racial or ethnic composition of schools do not make them racially identifiable nor diminish substantially the degree of "actual desegregation." Where a school departs so far from the systemwide composition, however, as to become racially identifiable, a different question is presented. The school's composition reduces the system's degree of "actual desegregation." Here the "practicalities" requiring this result must be specified.

"Practicalities of the Situation"

[14, 15] The "practicalities" that require flexibility in a remedy are simply all the legitimate concerns of the community. There can be no exhaustive list. These concerns vary greatly, of course, in their weight. A "practicality" frequently urged upon this court is the desirability of minimizing "forced busing", i. e., assignments to schools beyond walking distance. That concern certainly is legitimate, and entitled to weight. The court's "Guidelines" of October 31, 1974 called for a plan that minimized busing. The plan that the court has ordered into effect reflects the court's continuing efforts to hold compulsory busing to a minimum. The boundaries of the several districts were drawn to minimize the numbers of students bused and to limit distance travelled. A range of racial compositions of schools within each district also serves to minimize busing. Educational concerns also affect the form of a remedy. For example, the districts into which the system has been divided have been drawn so as to include appropriate school facilities at all levels and to avoid where possible one or two grade schools.

[16] Some of the parties have urged that the court limit the extent of actual desegregation lest children from middle class white families leave the public school system and to prevent racial turmoil and violence in Boston's schools and communities. The plaintiffs have argued, just as vigorously, that the court may not consider either "white flight" or the prospect of resistance to desegregation, in formulating the remedy. These prophecies of "white flight" and racial turmoil, like opposition itself, see e. g., *Brown II*, *supra*, 349 U.S. at 300, 75 S.Ct. 753, are not "practicalities" that can be weighed against the rights of the plaintiffs.[7] Opposition to a law-

7. Another ground for refusing to limit a remedy for fear of "white flight" is that a court would be presumptuous to try to predict the effect upon long-term trends in pop-

ful desegregation remedy reflects no legitimate interest. Expression of that opposition constitutes a problem, of course, which the desegregation plan must confront in its implementation. But it does not constitute one of the "practicalities" to which the plan itself properly can make an accommodation. The court may not limit desegregation in deference to such opposition. *Monroe, supra*, 391 U.S. at 459, 88 S.Ct. 1700; *United States v. Scotland Neck Board of Education*, 1972, 407 U.S. 484, 491, 92 S.Ct. 2214, 33 L.Ed.2d 75; *Hart, supra*, 383 F.Supp. at 742–43. To hold otherwise would be to trade away the constitutional rights of children to receive a desegregated education in order to appease parents and voters who prefer segregation to desegregation which involves forced busing, i. e., assignments to schools beyond walking distance. The impropriety of such an accommodation has long since been decided. *Brown II, supra*, 349 U.S. at 300, 75 S.Ct. 753; see *Cooper v. Aaron*, 1958, 358 U.S. 1, 7, 78 S.Ct. 1401, 3 L.Ed.2d 5; cf. *Morgan v. Kerrigan*, 1 Cir. 1974, 509 F.2d 580, 587. The rule of law must prevail.

Multiplicity of Measures

[17] Since equal educational opportunity is a central theme of the desegregation remedy, in this case as in others, *Morgan, supra*, 1 Cir. 1974, 509 F.2d 580, 598, n. 29, the remedy must do more than redistribute students. Reassignments to eliminate segregation are one means to the end of providing equal opportunity. The remedy should include measures to assure effective implementation, first, of the ban on active discrimination, second, of efforts to meet the special problems that accompany desegregation: the persisting effects of past discrimination, and the difficulties of transition, for both black and white students, from segregated to desegregated schooling.

[18] The plan in this case includes measures directed to these problems. The equalization of services at schools that have been unequal is a task that the universities and colleges have expressed a willingness to help carry out. The plan's provisions for district superintendents, councils of principals within each district, and a principal or headmaster at each school all are intended to assure that a responsible administration will be available to assure that the plan is carried out effectively. Such an administrative network can prevent some schools lagging behind others, cf. *Plaquemines Parish School Board v. United States*, 5 Cir. 1969, 415 F.2d 817, esp. n. 2 at 821; see generally *Swann, supra*, 402 U.S. at 18–19, 91 S.Ct. 1267; *United States v. Jefferson County Board of Education*, 5 Cir. 1967, 380 F.2d 385, 394–395; and see to it that curricula and programs of instruction are not discriminatory. See *United States v. Texas*, E. D.Tex.1971, 342 F.Supp. 24, 30–34, aff'd, 5 Cir. 1972, 466 F.2d 518.

[19] The nature of instruction given in the schools must also receive the attention of the court and its representatives. Instruction must be non-discriminatory and avoid racial stereotyping. The court's plan relies primarily on school personnel to assure non-discriminatory instruction. Their efforts will be monitored by citizen groups established under the plan. Other courts have made more detailed orders for the equalization of services, directing curriculum changes, construction, and acquisition of particular types of equipment. See, e. g., *Plaquemines, supra*, 415 F.2d at 831 (facilities to be constructed, including athletic fields with backstops); *Lee v. Macon County Board of Education*, M.D.Ala.1970, 317 F.Supp. 103, 111,

ulation movement of its adoption of a particular element, otherwise constitutionally required, in a desegregation plan. The masters received expert testimony on the subject of "white flight" from Boston's public schools during the current school year and concluded that the contention was a "misleading fiction." Report of the Masters, at 65 n. 1.

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112 (curricula of college-level trade schools to be equalized; one school to acquire an appropriate computer). In other cases remedial programs have been specifically required. See, e. g., *Jefferson County, supra*, 380 F.2d at 394. The plan in this case provides for a detailed review of vocational education programs, but in general relies on the performance of school staff and citizen groups to ensure provision of non-discriminatory instruction and services.

[20] The plan goes beyond assuring that no school is markedly worse than another by providing for the development of magnet programs, so that desegregation may as far as possible occur through voluntary choices. This use of specialized programs originated in this case with proposals in the plan submitted by the defendant school committee, as strengthened and clarified by the masters. Use of magnet programs to achieve desegregation is a method urged by the federal Education Amendments of 1974, Pub.L. 93-380, sec. 214(f), 20 U.S.C. § 1713(f), and supported by a Massachusetts statute providing for state funding for planning and implementation of such programs by local authorities. 1974 Mass.Acts and Resolves c. 636, § 8, Mass.G.L. c. 71, §§ 37*I*, 37J. See *Hart, supra*, 383 F.Supp. 769. In other cities magnet programs have aided desegregation. See *Booker v. Special School District No. 1, Minneapolis, Minn.*, D.Minn. 1972, 351 F.Supp. 799 (approving but not describing plan; the plan's use of magnet schools was described in exhibits submitted to the masters in the instant case).

[21] In order to develop true "magnets"—programs distinctive and attractive enough to draw ample applications—the plan calls on the expert aid of colleges and universities and of the city's business and cultural communities. Cf. *Arvizu v. Waco Independent School District*, W.D.Tex.1973, 373 F.Supp. 1264, 1280, aff'd in part, rev'd as to other issues, 5 Cir. 1974, 495 F.2d 499 (expert aid used in development of special bilingual, bicultural program in defendants' desegregation plan). These institutions will help each magnet school to build its special emphasis, an emphasis based on the school's present strengths and interests.

C.

School Districts

The citywide school district, containing schools at each grade level that are open to students from throughout the city, and the assignment process calling for parent and student involvement in educational choices in all districts are central to the court's plan. The purposes of the plan include the achievement of desegregation through voluntary choices to the maximum extent possible, and the provision of appropriate and attractive educational programs for students "at the end of the busride." Each citywide school has distinctive programs or features than can bring together students with common interests of all races.[8] In order to increase the magnetism of these schools, the court has paired colleges and universities with particular schools. Businesses have worked and will continue working in pairings with high schools. The resources of Boston are rich, and many cultural institutions and other groups have much to contribute to the public schools. The pairings established in this plan with particular schools and colleges and universities will, the court expects, create new links and strengthen old ones between public school students and these institutions of higher education. They can provide a focus for the good will and creative talents and unique resources of these institutions.

Each citywide school's student body will be desegregated and will closely reflect the composition of the city's student population. Students who apply to

8. The word "race" where used in this portion of the opinion refers also to ethnic groups such as Hispanics and Asian-Americans classified as "other minority."

a citywide school will know, then, that there will be no overwhelming majority of any race at the school such as might threaten or isolate the student. Cf. *Hart, supra*, 383 F.Supp. at 756. A citywide school, open to all students, will be no one's turf, i. e., will not be the territory of any one neighborhood or race. The goal of this arrangement is to make the school distinctive and attractive because of its concentration on the arts, or the classics, or on open space teaching methods, for example. It is to this end that citywide racial ratios will limit the enrollment at these schools.

The provisions of the plan regarding citywide schools are thus designed to attract students voluntarily to desegregated schools. Voluntary desegregation in this context will allow fulfillment of student preferences as to special programs and features, decrease the likelihood of racial conflict and tension and increase the probability that uninterrupted learning can take place. It is an attempt to achieve desegregated education with the emphasis on education.

[22] Community districts and the schools serving residents of those districts recognize the desire of many parents that students attend school within a defined geographical area in which they reside. The districts drawn in this plan reflect only generally concepts of communities as ethnic or racial neighborhoods. Rather, the communities defined by the plan's district lines are communities of schools, serving a defined body of students from kindergarten through grade 13. Parents and students from several neighborhoods will be served by the same group of schools, and through involvement in school activities and local district councils may forge new ties among neighborhoods.

Schools in community districts are equal in educational offerings to citywide schools. Colleges, universities and businesses are also paired with community district high schools to aid in developing programs at each district high school which shall offer a comprehensive education that reflects the needs of the district's students.

The district lines in the court's plan have been altered in some instances from those recommended by the masters. A key feature of all student desegregation plans filed and urged by the parties since the court's order of October 31, 1974 has been the division of the city into six or more zones (or "districts") and the desegregation of students residing in those zones using the school facilities located in them. The racial composition of the public school population resident in a particular district was crucial in projecting the racial composition of district schools, whose enrollments would consist primarily of students residing in the district.[9] The masters made substantial changes in the projected racial compositions of community districts from their draft report, filed March 21, to their final report, filed March 31. For example, in the West Roxbury district, the percentage of white students was increased from 70% to 80% and in the South Boston district from 50% to 60%. In order to obtain the most reliable information on which to base projections of the racial composition of districts, on April 2 the court ordered the school committee to file by April 10 an alphabetical list of all students enrolled in the public schools, showing their addresses and ethnicity. When the list was filed it showed, for example, that the projected percentage of white students in the West Roxbury district was 92% and in the South Boston district was 67%; in the district containing the lowest percentage of white students, the Burke district, the alphabetical list showed that the percentage of black students in that district was 63% rather than 50% as estimated by the masters in both their reports. Also, the masters' report filed March 31

9. Student transfers from one district to another had been virtually eliminated by the court's interlocutory order of June 21, 1974 and a series of orders entered later in 1974.

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added a provision permitting student transfers from one district to another for reasons including a "revision of program of studies", thereby complicating the task of making reliable projections of the racial composition of student bodies.

[23, 24] The data received by the court on April 10, 1975 raised the probability that the district lines recommended by the masters would define overwhelmingly white areas of the city, such as West Roxbury and South Boston, close to heavily black and Hispanic areas such as the Burke district. This could result in the sort of residential instability that could destroy in a few years the desegregation accomplished initially in those districts. White parents seeking to leave a district where their children were a minority in the school population could move to districts with white majorities, gradually resegregating both the districts they left and those they entered. Just as the location of schools is acknowledged to have an effect on residential segregation, *Swann*, *supra*, 402 U.S. at 20, 91 S.Ct. 1267, so large disparities in the racial composition of districts may endanger desegregation, and the court has an obligation to seek a plan that offers hope of lasting desegregation. In Boston, a city where it has been possible to draw desegregated districts that are relatively small in numbers of students and to limit transportation distances to an average of 2.5 miles each way within a district, the ability and need constitutionally to achieve a rough equality of racial compositions among districts is strong. The district lines ordered by the court produce districts that, with one exception, resemble adjacent districts in their racial composition, while considering the adequacy, capacity and location of schools at each grade level for the district's student population.

The district lines ordered by the court were also designed to enhance the promising educational proposals made by the masters. Students and parents now, in choosing among citywide and community district schools, will choose on the basis of the educational emphasis at a school as it meets the educational goals and needs of the student, and not on the basis of the racial compositions of a school.

[25] The districts in the court's plan have been drawn to avoid the need to deny students entry to citywide schools because of their race and district of residence. Under the masters' district lines, even the desegregation achieved within a district could be lost were admissions to a citywide school made without regard to the district's racial composition. To preserve desegregation within districts, blacks in West Roxbury and South Boston and whites in Burke might have to be denied a chance to attend the citywide school of their preference because of the need to avoid one-race schools in community districts. With the court's districts, which have a more desegregated student population to work from when allowing citywide admissions, the admissions procedures can permit students of every race from all districts to apply and be admitted to citywide schools while still preventing any community district schools from being overwhelmingly one race.

Another consequence of the receipt of current enrollment data after the masters ended their work was that their plan's promise of a community district seat for all high school students could not be delivered. A shortage of at least 6,000 community district seats appeared. Over the past several years Boston has had a shortage of seats for high school students. There are, however, sufficient seats for the city's high school students overall. Most of the citywide schools in the court's plan are high schools, and close to half of the city's high school students can be accommodated in the citywide schools. If students apply to these schools in large numbers, fewer students will be denied their choice of a community district high school and have to receive assignments to citywide

schools. Moreover, a number of construction projects now in progress will alleviate the shortage of high school seats when completed within the next few years. These include Southwest I and Madison Park High School now under construction and an Occupational Resource Center and Southwest II now in the planning stages.

[26] An exception to some of the previous discussion regarding community school districts is the district drawn for East Boston. East Boston, a section of Boston that has a school population, 95% white, of about 5700 students, is located across the harbor and adjacent to the Logan International Airport. It is approached via tunnels that run beneath the harbor and has good public transportation linking it with downtown Boston. The first thing to be noted about the East Boston community district under this plan is that there will be some desegregation of East Boston schools and students. At the elementary level, two schools in East Boston will be citywide schools, with desegregated student bodies. Students residing in East Boston can attend these schools only on a desegregated basis. At the middle school level, the new Barnes middle school, scheduled to open in September 1976, will also be a citywide school, leaving the old Barnes as the only middle school solely for district residents. At the high school level, East Boston Technical High will operate beginning in 1976–77 as a fully desegregated citywide school. Those resident high school students who are not admitted to East Boston Technical High will then be required to attend other desegregated citywide high schools in other sections of Boston. There will be no community district high school in the East Boston school district after the 1975–76 school year. In addition, the cooperative industrial program in machine shop instruction at East Boston High School will for the school year 1975–76 open its entering class and any vacancies in the program to enrollment by students from other districts on a desegregated basis.

Only those East Boston elementary and middle school students who do not choose citywide schools will remain in virtually all white schools. To desegregate these 11 schools in that section of the city would require transporting between four and five thousand children either into or out of other parts of Boston, many through the tunnels with their gassy air at heavy traffic hours, for distances of up to 5.2 miles one way. In addition, unless the schools and students of East Boston were divided among two or more districts, which would deny East Boston residents any concept of a community of schools, the merging of East Boston with the Madison Park District would create a geographically large district and place a further burden on black and other minority students by dispersing them to Back Bay, downtown, the North End, Charlestown and East Boston. The treatment of East Boston under the court's plan does not in our view deny or deprive the plaintiffs of the full vindication of their constitutional rights. There will be no segregated, predominantly black schools under the court's plan.[10] We find, therefore, that the slight advantages of desegregating those East Boston schools which will remain nearly all white under the plan are outweighed by equitable considerations of geography, education and burden of transportation in this instance. As to the prospect of East Boston becoming a haven

10. The cases are distinguishable, therefore, in which the incorporation of a geographically separate area was needed in order to desegregate the system's predominantly black schools. See, e. g., *Davis v. Board of School Commissioners of Mobile County*, 1971, 402 U.S. 33, 91 S.Ct. 1289, 28 L.Ed.2d 577; *United States v. Greenwood Municipal Separate School District*, 5 Cir. 1969, 406 F.2d 1086, *cert. denied*, 1969, 395 U.S. 907, 89 S. Ct. 1749, 23 L.Ed.2d 220; *United States v. Indianola Municipal Separate School District*, 5 Cir. 1969, 410 F.2d 626, *cert. denied* 1970, 396 U.S. 1011, 90 S.Ct. 571, 24 L.Ed. 2d 503.

for Boston parents seeking to avoid desegregation and thereby resegregating other districts, no party has contended that this will occur and we think it unlikely.

The districts in this plan and the guidelines for assigning students have been drawn to minimize required transportation as much as possible consistently with desegregating the city's schools. It should be remembered that busing has been commonplace in Boston public schools for decades. In 1972, the school committee leased 129 buses for student transportation each day. And, in 1972, more than 30,000 students—roughly 35% of the entire student population—were bused or used the subway daily to and from school. While, as stated in the plan, it is not possible to desegregate Boston's schools without mandatory transportation, distances and times travelled will be reasonable compared to those required in other desegregation cases and, for elementary and middle school students, within the bounds of their school districts. The plan's estimate that approximately 21,000 students will be mandatorily transported rests upon an analysis by the court-appointed experts. Only rough estimates can be made because the number of students who will choose to attend citywide schools and programs cannot be known until after completion of the assignment process.

The court has heard members of the school committee in testimony and others speak against "forced busing" and has received hundreds of letters protesting its use in connection with the state court plan currently in operation. Toward lessening widespread misunderstanding on the point, it may be stated that the court does not favor forced busing. Nor, for that matter, have the plaintiffs advocated forced busing. What the plaintiffs seek, and what the law of the land as interpreted by the Supreme Court of the United States commands, is that plaintiffs' right to attend desegregated schools be realized. That right cannot lawfully be limited to walk-in schools. *Swann, supra*, 402 U.S. at 30, 91 S.Ct. 1267. If there were a way to accomplish desegregation in Boston without transporting students to schools beyond walking distance, the court and all parties would much prefer that alternative. In past years, feasible proposals that would have substantially lessened segregation through redistricting without busing were made by various public agencies and uniformly rejected or evaded by the Boston School Committee. The harvest of these years of obstruction and of maintenance of segregated schools is that today, given the locations and capacities of its school buildings and the racial concentrations of its population, Boston is simply not a city that can provide its black schoolchildren with a desegregated education absent considerable mandatory transportation. No party familiar with the requirements of the law and with the city has ever suggested otherwise.

Regrettably the same cannot be said about various elected officials. This is an election year in Boston and candidates are already campaigning for municipal offices. Many of them are proclaiming that they are for school desegregation but against forced busing. They refuse to face up to the dilemma stated by school committee member Kerrigan in his testimony, *supra* p. 226, as follows:

> "It is unfortunate that is the way our society exists, the way the housing patterns are laid out, but the only way you are going to desegregate city schools is through forced busing."

They tell the parents that they will take steps to bring about an amendment to the federal Constitution that will ban forced busing, neglecting to add that it takes several years to adopt even a relatively noncontroversial amendment. Meanwhile the children suffer.

In the court's opinion the effect of mandatory transportation on students can be neutral or destructive, depending upon the community's response to the

requirements of the law. Here "community" means not only parents and school department personnel but also leaders of civic, religious, fraternal, business, labor, educational, cultural and other organizations and institutions. If the atmosphere surrounding desegregation is such that a child goes to a school where children of other races welcome him without fear, and where he can learn in an educationally productive atmosphere, the fact that his school is a bus-ride away may be little more than an inconvenience. This is not to say that enormous efforts will not be required to reduce racial tensions which have increased in Boston during the current school year, and which continue to be exploited by various elected officials. No effort will be spared to assure the safety of students while attending or en route to a school. Many public and private agencies will be working for peaceful implementation of the plan, including the 42 member Citywide Coordinating Council recently appointed by the court. The plan adopted by the court attempts to minimize forced busing and mute the legally pointless controversy surrounding it, while at the same time advancing the positive goal of improving the quality of education available in Boston's public schools for all students whatever their race or ethnic origin.

D.

Guidelines for Assigning Students

[27] The plan's assignment guidelines aim, first, to make sure that schools are not identifiably one-race, and secondly, to assure that no racial or ethnic group—black, white or other minority—is disproportionately isolated in any school, considering its share in the relevant student population. The first aim is of course basic to desegregation. But the second, important to the remedy's durability, accounts for the greater part of the plan's detailed assignment provisions.[11] In assignments to citywide schools, the guidelines seek to prevent isolation very simply, by providing for close adherence to systemwide composition. Cf. *Hart, supra*, 383 F.Supp at 756 (magnet school composition to lie within ten percentage points of district composition). Since the citywide schools enroll students from throughout the system, the lack of the geographical constraints such as control assignment guidelines in community districts permits enrollments at these citywide schools reflecting the school system's overall enrollment. Other reasons for the setting of ranges of racial composition in citywide schools have been explained in the previous section of this memorandum. In community districts, the assignment guidelines allow for generally wider variations, but still within limits designed to achieve the same goal, preventing disproportionate isolation.

[28] The variations in the composition of community district schools recognize the central importance of minimizing the distance between the student's home and the assigned school, especially at the elementary level, and the practical difficulties of making geographical assignments. Each community district school will have assigned to it an attendance area made up of a set of "geocodes."[12] Geocode assignment, un-

11. The plan's student assignment guidelines set out a process for assignment, rather than a finished attendance plan. A finished plan for community district schools, showing the geocode areas served by each community district school, is to be drawn by the school department pursuant to the guidelines and will be reviewed by the court. The review will consider not only whether the school compositions lie within the guideline limits but also, more generally, whether the assignments show a reasonable accommodation, within the permissible ranges, of the several interests the plan is designed to serve.

12. "Geocodes" are the 800-odd areas, each several blocks in size, into which the school department has divided the city for planning purposes (as noted in the plan, p. 252). The units were devised originally for police reporting purposes and vary in geographical area and also in student population, ranging from a few to several hundred students.

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like individual or address assignment recommended by the masters,[13] allows students to attend school with their immediate neighbors of all races. Assignment by geocodes can be done much more rapidly than assignment by individual address, and will enable notification of parents of student assignments at an earlier date. Use of geocodes means, for example, that if most of the students residing in a geocode are white, and that geocode is assigned for desegregation to a school in a black area, any black students living in that geocode will also be assigned to that school. Thus some transportation of black students into black areas, and of white students into white areas, will occur and in this sense will not be directly desegregative. However, geocode assignments offer the advantage of fostering contact of students in school with their neighbors at home within a geocode. Students who are transported to school will travel with their neighbors, attend school with them, and be able to maintain ties developed in school while in their home neighborhoods. The advantages of geocode assignment, speed and even group treatment, make it preferable in the court's opinion to a system of school assignment that separates next door neighbors consistently on the basis of race. The difficulty of fitting the disparate geocodes to the system's irregularly distributed school facilities demands some leeway in school composition.[14] This leeway, easing the assignment process, operates also to diminish the amount of busing that is required.

[29] The guidelines provide this appropriate latitude for assignments to community district schools. The limits on variation have been determined by considering the competing interests that to the court seem most important. Once racially identifiable schools have been eliminated, two primary concerns remain: on the one hand, to allow students to attend school near their homes; on the other hand, to minimize any sense of isolation that students, white, black or other minority, might feel. The guidelines accommodate these two interests by letting the breadth of variation [15] depend on the size of the racial or ethnic group that is considered. A large group can accept a relatively large reduction in numbers without its members' feeling the discomfort of relative isolation. Members of a small group reduced by the same number of students might be reduced to such an extent as to feel isolated, uneasy and defensive. That is the basis for the guidelines' use of a constant percentage (25%) to define variation limits: the larger the group, the larger will be the possible variation in the number of students of that group assigned to a particular school.

The assignment guidelines are intended to assure that "other minority" students will also be afforded "equally desegregated education", as stated in this court's order of October 31, 1974. They therefore provide for assignments that neither isolate nor excessively concentrate "other minority" students. This policy is adopted in the interests of all, not only for the sake of the "other minority" students. Taking advantage of Boston's ethnic variety, then, the guidelines provide that in the districts with substantial numbers of "other minority"

13. The relative merits of assignments by address and by geocode are discussed at length in the State Defendants' Critique of Masters' Plan filed April 8, 1975, at pp. 48-51.

14. The same necessity supports the plan's provision, at p. 72, that geocodes may in some instances be divided into as many as three parts.

15. Variation is measured from district rather than system composition in community district assignments. Each district's schools will enroll only students residing in the district. The range of racial compositions in the schools within a district will be determined by reference to the percentages labeled "K-13 Total" at the bottom line of the tables following the eight district maps appearing in the plan.

students (about half of the eight community districts), students from that group will be enrolled at each school. In Madison Park District, for example, at every district school each of the three major racial or ethnic groups will be strongly represented, but none will make up a majority. "Other minority" students in this district—slightly more than half of them Oriental, most of the remainder Hispanic—will constitute from one-fifth to slightly less than a third of each school's student body.

[30] The plan's assignment guidelines thus take account of "other minority" students, but do not simply aggregate them with black students, in prescribing school composition limits. Plaintiffs-intervenors, El Comite de Padres Pro Defensa de la Educacion Bilingue, representing the class of Spanish-speaking students and their parents, have stressed their right to adequate bilingual education. The remedy accordingly concentrates on providing bilingual schooling for Hispanic students and for others in need of this service.

[31] Assignment of bilingual students before others will prevent excessive dispersal. Thus the "clustering" of bilingual classes will be possible and Boston's schools will be enabled to fulfill the promise of this state's exemplary bilingual education law (Transitional Bilingual Education Act, Mass.G.L. c. 71A), as well as to meet the requirements of the federal Civil Rights Act of 1964 (42 U.S.C. § 2000d). See 35 Federal Register 11595 (1970); *Lau v. Nichols*, 1974, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1; *United States v. Texas Education Agency*, 5 Cir. 1972 (en banc), 467 F.2d 848, motion to clarify mandate denied, 5 Cir. 1973, 470 F.2d 1001.

Without merely aggregating black and other minority students, the guidelines prescribed at pp. 72–76 of the plan (in conjunction with the racial compositions of the various community districts) nevertheless provide that plaintiff black students shall not be assigned to schools with only "other minority" students. Cf. *Arvizu v. Waco Independent School District*, W.D.Tex.1973, 373 F.Supp. 1264, 1268–70, aff'd in part, rev'd as to other issues, 5 Cir. 1974, 495 F.2d 499. This result is appropriate to satisfy both of the primary concerns of desegregation. Black students should not be assigned in a manner that suggests they have been relegated to "minority" schools; for the "segregated" quality of a school depends in part on the way the community looks upon that school. See *Keyes*, *supra*, 413 U.S. at 196, 93 S.Ct. 2686. And black students ought not to be assigned in a manner that isolates them from the majority culture. The assignment guidelines aim for three-way desegregation in the schools for two primary reasons: first, to provide a proper remedy for the plaintiff class of black students and parents; second, to afford to all groups—white, black and other minority—the sense of adequate representation that can help achieve peaceful and lasting desegregation.

E.

Examination Schools

The desegregation of the examination schools, Boston Latin School, Boston Latin Academy, and Boston Technical High, particularly the two Latin schools which have six-year programs beginning in the seventh grade, has been a particular subject of concern to the parties and the court throughout the process of formulating a remedy for implementation in the fall of 1975. Yet despite many hours of attention, the parties and the court have had very little data with which to analyze the effects of various proposals affecting the grade structure and admissions process of these schools. Much information was filed on May 2, 1975 which will have to be analyzed by the parties and the court before it is used to aid in the establishment of admissions criteria for future years and for other purposes. But the need for additional information and for evaluation of the results of proposed and or-

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dered procedures are the reasons for the interim nature of the court's order with respect to the examination schools.

The school department's computer data of April 9, 1975 show 113 blacks and 13 Hispanic students at Boston Latin School out of a total of 1893 students; and 97 black and 7 Hispanic students out of a total of 1097 students at Boston Latin Academy. Boston Technical High is less segregated, with a student population that is 67% white, 25% black and 8% other minority.

[32] All of the proposals made by the parties and the masters for desegregation of the Latin and Technical schools have directed desegregation efforts toward the entering grades at those schools, the seventh and ninth grades. The program at the examination schools is one that each year builds upon the subjects taken the prior year and which differs in content from the general comprehensive high school's curriculum. The Latin schools provide a strong emphasis on classics and languages; Technical High, on the areas of mathematics and science. Introduction of new students at every grade could seriously affect the programs at the schools and leave the students entering those particular grades without the prior years' preparation that is needed to keep pace with and fully benefit from the programs at these schools. The court finds that desegregation of only the entering grades at the examination schools, instead of desegregating all grades at once, is plainly appropriate in this case. The students already in attendance will be unaffected by the court's order, except for the addition to the present eighth grade (grade nine next fall) of a relatively small number of students admitted on a desegregated basis. A gradual desegregation of the entering classes will allow the school department the opportunity to identify and recruit increasing numbers of black and Hispanic students who are qualified to attend and succeed at the examination schools.

Students' scores on the SSAT examination, either alone or in combination with grade point averages, have been proposed by several parties for use as criteria for admission to the examination schools. The Latin School Alumni Associations, acting as amicus curiae, developed the most detailed proposal, which was adopted by the School Committee. Under their proposal, 65% of the seats in the entering classes would be filled solely on the basis of SSAT scores, without regard to race. The remaining 35% of the seats would be filled on a ratio of 25 blacks to 10 whites, using SSAT scores in combination with grade point averages, but setting a score in the 50th percentile on the SSAT as a floor for admission.[16] No evidence or data has been received that would demonstrate that this use of the SSAT would result in substantial desegregation of the entering grades at the examination schools. The only evidence on this issue, filed by plaintiffs, shows that using the results of the *1973* SSAT examination, a use of the median score as a floor for admissions would have created entering classes of 10% black at Boston Latin School, 20% black at Boston Latin Academy and 19% black at Boston Technical High. The affidavit of Mr. Wilfred L. O'Leary, headmaster of Boston Latin School, while urging use of the 50th percentile as a minimum standard, concedes that this standard is an assessment based on his experience, not on racial data or studies that would show that students scoring below that mark would be unable to learn and succeed within the Latin schools' program.

[33] Nor is it clear that the SSAT is the most valid or even a generally valid method of identifying black and

16. Under the court's order, the Latin School Alumni Associations' proposal can be implemented if to do so would result in entering classes at the seventh and ninth grades containing 35% combined black and Hispanic enrollment.

white students who can benefit from a Latin school curriculum. It is attractive because it is available, and apparently has value as a predictor of academic success. It is generally accepted, however, that blacks fare worse on this type of examination. There have been suggestions, but little evidence, that the SSAT itself is a culturally biased test. But more significant is that given the segregated history of the Boston public school system at the elementary school level, in particular the segregation still existing in advanced work classes, which successfully feed children into the examination schools and "prep" them for the examination, any use this year of an arbitrarily selected SSAT examination score cut-off that prevents the desegregation of these schools must be rejected. We do not have the information to suggest that a cut-off of the 50th, 40th or other percentile is an appropriate minimum standard. Nor can we say that it is impossible to develop admissions criteria that do identify students, black and white, as having the ability to benefit from and succeed in these schools' programs. We encourage the parties to work together on evolving such standards for use in future years. It is for these reasons that the court has made no specific all-inclusive order as to criteria for this year, but has, rather, permitted the school department to use grades and test scores as it deems appropriate to obtain desegregated entering classes at these schools.

The examination schools are citywide schools and are treated by the court plan as part of the network of magnet schools in citywide school district 9. In desegregating through citywide magnet schools, the plan requires that the enrollment at these schools be within a ten percent range of the racial composition of the school system as a whole. All other citywide schools will enroll new students at all grades in the fall of 1975, and will be at least 44% black and other minority. Because of the special nature of the examination schools, a more gradual process of desegregation has been adopted for these schools. As discussed above, only the entering classes at the schools are required to enroll new students, in order to preserve the strengths of the schools' sequential curriculum. And a minimum percentage of 35% black and Hispanic has been set for the entering classes, as contrasted with the 44% black and other minority enrollment required at other citywide schools. The main reason for this lower minimum requirement in desegregating the examination schools is that all grades at the examination schools now enroll between 6% and 8% Asian-American students. Thus the anticipated enrollment in the entering class at the examination schools will be similar regarding racial and ethnic composition to that at other citywide high schools.

[34] The masters recommended the phased elimination of the seventh and eighth grades at the Latin schools, to create a 9–12 grade program that conforms in grade structure to the rest of the public school system. Other parties have proposed the addition of a sixth grade, or the separation and creation of a Latin middle school, for the same reason. There are a number of educational reasons that either support or counter such proposals. If the Latin schools can be desegregated at the seventh and eighth grades, there is no necessity for discontinuing those grades as part of a desegregation remedy.[17] Should successful desegregation not be possible in this way, however, jurisdiction has been specifically retained regarding elimination of grades seven and eight, addition

17. The point has been made that it is desirable for all students in the system to choose their desired high school program at the same point, the end of middle school, in eighth grade. The Latin schools do, of course, take a limited number of students who enter at the ninth grade. There has, however, been no evidence that the existence of an earlier opportunity to enter the Latin schools disadvantages or denies equal educational opportunity disproportionately to black students.

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of grade six, or other changes in the grade structure at the Latin schools. The school committee may for educational reasons make such changes in grade structure so long as they assure and do not impede desegregation at all grade levels.

The remainder of the plan adopts proposals of the Latin School Alumni Associations and the school committee for ongoing evaluation of admissions criteria and racial data, increased recruitment of black and Hispanic students, and desegregated preparatory and remedial programs.

F.

School Closings and Capacities

[35] The plan calls for the closing of twenty school facilities, listed on p. 7, most at the elementary level. Ten other facilities which are now closed will remain closed under the plan and will not be rehabilitated. There are several school facilities, including the Old Quincy, the Washington Irving portables, the Bigelow portables and the Horace Mann school, which are not listed in the court plan either as schools to be closed or as usable facilities. The timing of the planned closing of the Old Quincy school and the future use of the other facilities are to be resolved through discussions between school department staff and the court-appointed experts, subject to the approval of the court.

The closing of schools as part of the plan serves a number of purposes. Many schools in Boston have long been recommended by many agencies, independent experts, and by the city and state, for closing or replacement as unfit for school use. The necessity of reassigning students for desegregation provides an opportunity to close some of the worst of these schools and make use of the more structurally sound facilities. A major reason for closing schools is that desegregation is more easily and economically achieved through the consolidation of student bodies. Many of the city's elementary schools in black areas have in the past been overcrowded; many elementary schools in white areas have been underutilized, e. g., when a new school was constructed to replace an old one in a predominantly white neighborhood, the school committee accommodated parents protesting the closing of the old one by keeping them both open. Should school facilities be uniformly used to capacity, an excess of several thousand available seats at the elementary school level would remain. Thus a number of the older elementary schools can be closed, with accompanying savings of the costs of operating and heating those schools. Elementary schools will be kept open whose locations enable busing to be minimized overall, and which permit the more efficient assignment of students by geocodes, accomplishing desegregation and minimizing the need to split geocodes. Uniform utilization of facilities throughout the city will also tend to equalize the availability of the system's resources to all students.

School closings are being ordered on the basis of expert assessment of excess seating capacity for the number of students who will be in the schools in the various districts in the fall of 1975. The capacity figures listed in the plan are ceilings which may not be exceeded. These ceilings were set by the court-appointed experts after taking in most instances the most conservative of the estimates provided by state, city and school department officials and then further reducing that estimate in order to be on the safe side. Enrollments in most cases will be well below those ceilings, and will reflect the judgment of the school department and the court-appointed experts, subject to court review, as to what constitutes full and efficient utilization of the educational facilities of a particular school. The number of students attending district schools in 1975–76 will be less than the total number of residents in a district who enrolled in a public school this year, partly because substantial numbers from each district will be attending citywide magnet schools and programs. Also, over 2,000 students who enrolled in school at

some time during 1974–75 have attended school on less than one-third of the school days during the current school year, suggesting paper projections for next year of a tighter fit between seats and students than may materialize in the classroom. It is not expected that any condition of overcrowding at the elementary or middle level will occur.

[36] However, if overcrowding or other problems due to inadequate space should develop, they may not be solved by using unsuitable space such as hallways, utility rooms, auditoriums and the like. If need be, one or more schools that the plan states shall be closed may be reopened. It is the plan's purpose that no elementary or middle school student will have to attend school outside the community school district of his residence usless that is the student's or parent's preference. The court's decisions as to assignment processes, school closings and capacities which have been incorporated in the plan have all been controlled by this goal.

As many as 55 of the approximately 167 school facilities in Boston have been recommended for closing or replacement by various agencies. Closing schools is always a difficult decision, especially since some schools whose location and physical condition compel their closing have promising educational programs. Attempts have been made to close schools that are in poor condition or unsafe in both black, other minority and white areas to avoid burdening any one group unfairly. We find that on the basis of the factors discussed, the closing of each of the twenty schools listed in the plan is warranted.

G.

Magnet Schools and Programs

At present, Boston has a number of schools with distinctive or magnet programs attracting students from throughout the city. At the high school level these schools include Boston High School, Boston Latin Academy, Boston Latin School, Boston Technical School, Boston Trade, Copley Square, and the Occupational Resource Center. Additional citywide schools with distinctive programs have been added by the plan. To assist the Boston school system in developing the new magnet programs and also in improving the quality of education throughout the school system, the plan adopts the concept of pairing of colleges and universities with particular schools developed by the masters. Twenty colleges and universities have been paired with particular schools in both citywide and community school districts, and collaborative efforts have already begun with the assistance of an ad hoc committee of attorneys appointed by the court. Planning between the public schools and the colleges and universities is being directed toward the formulation and implementation of programs to provide distinctive, non-discriminatory educational instruction. The process of planning and developing new educational programs is a complex and continuing one. It is impossible to predict whether programs now in the planning stage will have been developed completely by the fall of this year. However, a great amount of effort is currently being expended. Funding of $900,000 for planning by colleges and universities has already been allocated by the State Board of Education, and the court, after hearing, has ordered the school committee to employ during the coming summer months teachers and administrative personnel reasonably necessary for the joint planning process. The state Secretary of Education has recommended the allocation of additional funds to assist implementation of this feature of the plan when schools open in the fall. The United States Office of Education has designated Boston as highest priority for obtaining federal Emergency School Aid Act (ESAA) funds. The Regional Director of HEW has agreed to exert every effort to obtain all possible funding for planning and implementing program components developed in this effort. In addition to new programs, magnet-type programs which were in existence during the 1974–75 school year will continue and in

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some instances will have been expanded by the time schools open in the fall.

College and university assistance will be aimed at improving and equalizing the learning outcomes of students in whatever program, school, or district the college works with. The approaches taken by the paired partners may include staff development and training, the design of instruction, materials and methods planning or other organizational processes basic to the school or district and concentration on community relations. The choice will depend upon a joint estimate of what is needed, and a determination of how the capabilities and interests of the college or university can best serve these needs. The court does not expect miracles or the achievement of unattainable goals within limited time constraints. The court does believe, however, that each college and university can work out one or more tangible, promising lines of educational development in company with its public school counterpart. The court appreciates the pledges of full cooperation by the colleges and universities received in writing and in meetings it has had with the presidents of the institutions of higher learning.[18] The significance of this pairing effort is as a long-term commitment, a promise to the parents and students of Boston that these institutions, with their rich educational resources, are concerning themselves in a direct way with the quality of education in the public schools.

The court adopts the masters' recommendation that contracts or memoranda of agreements be developed between the colleges and universities and the Boston public schools. The court has ordered the school department to use its best efforts to negotiate a contract pertaining to each paired school acceptable to both the school committee and the contracting institution of higher learning. The superintendent has become involved personally and has appointed a coordinator to supervise exchanges of information and suggestions between the colleges and the faculty and staff at paired schools. Developing a written agreement is in itself a means of getting the parties together. Discussions now in progress may resolve such questions as scope of authority, division of responsibility, communications and control procedures, access, planning and review schedules, conditions for withdrawal by one or both parties, ownership of or editorial control over reports on projects, and other points. The contracts may identify the locus of control over different resources, whether exchanges in kind or receipt and handling of funds. In some contracts, the school department may serve as the fiscal agent and in others, the college or the State Education Department or some other third party close to the project. A contract or memorandum of agreement may also make plain those spheres in which the college would take no responsibility. The working conditions and contractual obligations of Boston teachers will be respected in these efforts. The officials of the Boston Teachers Union have supported the pairings developed by the masters.

In the court's view it is important to the success of these efforts that the agreements between individual colleges or universities and the school department be the result of negotiations by both parties, and be tailored to the particular roles settled on by the parties in each instance. Therefore, the court has refrained from mandating any form of agreement or terms that a contract must include. The importance of this effort to the success of the court's plan for desegregation of the schools and particularly to the voluntary component of this plan, however, leads the court to reserve jurisdiction to make further orders in this area should they become necessary.

The commitments of businesses primarily through the Boston Trilateral Task Force to continue and enlarge programs of support to the schools through similar pairings, and of the Metropoli-

18. A copy of a typical letter of commitment from Suffolk University appears as Appendix C.

tan Cultural Alliance to continue its innovative and enriching programs and focus them on aiding in the peaceful desegregation of the schools are also major contributions. From the rich resources of the Boston area, other groups such as labor organizations, may join in planning programs with the schools, possibly through pairings like those established in the plan. A committee of the Boston Bar Association is making continuing efforts to aid in developing institutional support. The efforts of so many people to enrich public education in such diverse and promising ways will help ease the transition of Boston's school system from a dual system to one with no "black" schools or "white" schools, but just schools.

H.

Citizen Participation, Monitoring and Reporting

The court adopts with some modifications the masters' recommendations for the establishment of a Citywide Coordinating Council with responsibility for monitoring implementation of the court's desegregation orders, and for community District Advisory Councils that provide a structure for community participation. The court has related to these new groups the racial-ethnic councils of parents and students citywide and at each impacted school which were established by orders entered in 1974. The court endorses, as did the masters, the continued independent service of the Home and School Associations, the Citywide Educational Coalition and other groups working to enhance the quality and equality of education in the public schools of the city.

[37] Proposals for some court-established method of citizen participation and monitoring were put forward and supported by the parties as early as August of 1974. On October 4, 1974 the court issued an order, which all the parties had a part in drafting, establishing racial-ethnic parent and student councils ("RPCs and RSCs") at many schools, to deal with racial tensions and problems at the individual school level. A citywide parents' advisory council ("CPAC") was established to coordinate activities and disseminate information among school RPCs.

The establishment of a citywide group of citizens charged with informing the community and monitoring implementation of the court's orders regarding desegregation had been supported by most, if not all, of the parties. In the fall of 1974, the Community Relations Service (CRS) of the United States Department of Justice prepared at the request of the court a report on the structure, function and success of the court-appointed citizens' committee in Denver, and on those in a number of other cities operating under desegregation orders.

Based on the information gathered by the CRS, the court finds that a citywide coordinating council of approximately 40 members will form a broad-based group whose membership will reflect the richness of Boston's human and community resources. Use of a committee structure such as exists in the Denver model will enable efficient and effective functioning of the council despite the large number of members.

The court also adopts the masters' recommendation for the establishment of district advisory councils. Each district council will have a membership of ten parents, out of a maximum of 20 members. The size of the council can vary to include representatives of community groups and other agencies active in public school education in the particular district. RPCs and RSCs will provide a logical representative route to fill the parent and student seats on the district councils: the plan provides that parent and student district council members be selected by members of RPCs and RSCs. Elections of RPCs and RSCs are open to all parents of students attending school and to all attending students. The previously established racial and ethnic compositions of RPCs and RSCs will ensure that parental and student representation on district councils will be racially and ethnically diverse, without the

need to set further racial and ethnic quotas.

Numerous cases provide support for the establishment of biracial and multiracial groups to act as advisory and monitoring bodies during the desegregation process, e. g., *Singleton v. Jackson Municipal School District*, 5 Cir. 1970, 426 F.2d 1364; *Keyes v. School Dist. No. 1, Denver, Colo.*, D.Colo.1974, 380 F.Supp. 673. The structure established here will aid in the accomplishment of peaceful and constructive desegregation of the schools.

[38] As a method of informing the court of the progress of desegregation in the school system, we have adopted the masters' recommendation and require the filing of annual reports by the Superintendent. The information required includes data suggested by the masters as a part of these reports, as well as other information required in other desegregation cases such as those in Denver and in Jackson, Mississippi.

The masters' recommendation that the school department file a report on the design and implementation of a uniform disciplinary code has not as yet been acted upon. The court is, of course, concerned with the nondiscriminatory enforcement of discipline in the schools and with the due process rights of all students. See *Wood v. Strickland*, 1975, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214; *Goss v. Lopez*, 1975, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725. However, because of the pendency of motions filed by the Children's Defense Fund and others concerning student discipline, this matter will be the subject of separate future hearings and orders.

IV

Conclusion

The student desegregation plan ordered by the court for Boston's public schools is a complex design. A network of citywide magnet schools with distinctive features and particular assignment guidelines has been combined with the division of the city into geographically bounded school districts. Within these districts assignments to schools are governed by separate, yet interdependent guidelines. The assignment process calls for parents' and students' choices of educational programs to be considered individually and granted where possible consistently with desegregation. Consideration of dozens of special programs and problems is reflected in the many specific provisions of the plan. Particular provisions deal with assignment of kindergarteners, high school seniors, students now in vocational education programs, attendance at the examination schools, students requiring bilingual education or special needs attention, and students receiving Title I services.

Colleges, universities, businesses and cultural institutions have accepted invitations to work along with the school department to develop programs in citywide and district schools that will be educationally sound and attractive, and to expand and improve existing programs. A network of organizations for citizen participation and monitoring will be established. Racial Ethnic Councils of parents and of students will meet at the individual school level and representatively in a Citywide Parents Advisory Council. There will be Community District Advisory Councils in every school district where parents, students, school staff and others involved in education in that district can meet to discuss the educational needs of the district and to monitor the peaceful desegregation of the district's schools. A Citywide Coordinating Council composed of members of core city communities and of the Greater Boston business and educational community will monitor and work for peaceful desegregation of the schools under the court's orders.

The plan does not order the involvement of Boston's suburbs in the desegregation remedy. As of this date, there has been no factual showing that "racially discriminatory acts of the state or local school districts [i. e., school systems], or of a single school district have been a substantial cause of *inter-district*

segregation" (emphasis added), the legal basis outlined by the Supreme Court in *Milliken v. Bradley*, 1974, 418 U.S. 717, 745, 94 S.Ct. 3112, 3127, 41 L.Ed.2d 1069, as necessary before any formulation of an interdistrict remedy. A motion by the Mayor addressed to this issue has been briefed by the parties and awaits future hearing. However, the court encourages the continuation of the voluntary, cooperative efforts being made in programs involving suburban and Boston schoolchildren.

The timetable in the court plan sets forth the numerous important steps that must be completed before desegregated schools can receive students next fall. This list is incomplete, as it must be. No specific orders could cover all the planning and activities that must take place in many areas, from magnet programs to building renovations to contracts for transportation to security measures to training of teachers and staff, etc., in order to fully implement the plan.

The cooperation and efforts of persons not parties in this case will also be needed. The training and sensitivity of Boston's teachers to the human problems attending desegregation, and their energy in developing magnet programs and devising non-discriminatory curricula will be essential. Parents are asked to become involved in choosing among educational programs for their children and in serving on the various councils that will deal with the conflicts and problems which are inevitable in the desegregation process. The indispensable collaboration of paired colleges, universities and businesses has been discussed at length. City and state agencies will be called on for expertise and assistance in the conversion and construction of facilities, the provision of safety and security for students in and out of school, the financial requirements of desegregation, the development of magnet educational programs and in other areas.

The plan and the demands of its implementation on the people of Boston are necessarily as diverse and complex as the needs and characteristics of the city's public schools. The extent to which it will succeed in desegregating the public schools and improving the quality of education given in them remains to be seen. One thing, however, seems clear: the education of a generation of Boston students is at stake. It is the students in the schools who will be directly and permanently affected by the way the citizens of Boston carry out the plan.

V. Excerpts from Student Desegregation Plan

A. THE COMMUNITY SCHOOL DISTRICTS

Definition and Purposes

A Community School District is an area of the city, clearly bounded by identifiable lines on a map, within which all residents are entitled to attend the public schools in that area, as seat capacities may allow. Maps, geocodes and facilities tables of the eight community districts appear *infra*, on page 253. The purposes of these Districts are: (a) To accomplish desegregation of the schools in conformance with constitutional principles; (b) To correlate the programs and operations of public educational services with the needs and interests of residents and students within a natural unit or combination of units of the residential communities of Boston; (c) To enable parents and students to plan a coherent sequence of learning experiences within an identifiable series of schools that culminate in Community District High Schools; (d) To minimize the costs and burdens of transporting students, staff, and material between distant points in the city; and (e) To utilize existing facilities fully and efficiently.

[39] No Community District boundary shall be modified except on notice to the parties with the review and approval of the court. Community District schools shall be equal in quality and status in all respects to Citywide schools and programs. No teacher or school administrator in a Citywide school may remand a student to a district school as unsuitable for the Citywide school or as

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a punishment. Neither may schools in any Community District develop alternative programs which operate *de facto* as preventive detention or short-term segregation facilities. There shall be no segregation of students within schools, classrooms, or programs in the school system.

Administration

The city defendants shall forthwith appoint, or transfer from an existing Area Superintendency, a Community Superintendent as the chief school officer for each Community District. Each Community Superintendent shall report to the Superintendent or his Deputy and shall also consult with and be advised regularly by a Community District Advisory Council. Such Councils are established by the section of this plan entitled "Citizen Participation, Monitoring and Reporting". Each Community District school facility shall, before July 1, 1976, be administered by an administrator of the rank of principal or headmaster. Selection of all administrators is subject to future orders of the court on the desegregation of administrators, as to which plaintiffs filed a comprehensive proposal and memorandum on May 7, 1975. Principals and headmasters in each Community District shall constitute an administrative cabinet to be known as the Council of Principals, which shall be chaired by the Community Superintendent.

Each Community District shall maintain a District Office that is located in a school facility within easy reach of all residents. The Office shall contain the Community Superintendent, a secretary for staff support of Community District Advisory Councils, and a professional staff charged with district-wide servicing of ancillary and support programs. The District Office shall also be the meeting place and facility for use by members of the Community District Advisory Council, the Council of Principals, and of Racial-Ethnic Parents' Councils.

Curriculum and Grade Structure

Within the limits established by state standards, the policies of the School Department, and contractual obligations entered into with a paired college or university, each Community School District shall develop its curriculum and programs of instruction and extra-curricular activities in response to the needs and interests of the parents and students resident within the District, so that programs are non-discriminatory and inclusive of all ethnic groups. All extra-curricular activities and athletic programs shall be available and conducted on a desegregated basis. These responses shall be coherent from grade to grade and from school to school. Programs of instruction at all levels shall be planned to reinforce the quality of learning within the District High School. Each high school shall be a four year, comprehensive institution which serves with equal and uniform excellence of instruction, students seeking general culminating education, those seeking vocational training or experience, and those seeking preparation for post-secondary study. Each District High School shall also serve as an Adult or Multipurpose Community Education facility.

Community District school grade structures shall be uniform. Schools shall be 1–5 at the elementary level, 6–8 at the middle school level, and 9–12 at the high school level. They may enroll 13th graders. Most but not all elementary schools shall contain kindergartens. Kindergarten assignments shall be made by the School Department[1] to appropriate facilities, and may include inter-district assignments. Kindergarten classes shall be desegregated wherever possible. If kindergarten students must be assigned to schools outside their home

1. The words "School Department" refer collectively and individually to the members of the Boston School Committee and Superintendent and their agents, servants, employees and attorneys and all other persons under their control.

neighborhoods, the assignments shall be made in accordance with two principles: (1) The resulting student bodies shall be desegregated, and (2) the burdens of distance and transportation shall be distributed equitably across ethnic groups.

Bilingual Students

[40] Schools where bilingual programs shall be provided are shown in the school tables which are part of this plan. Where 20 or more kindergarten students attend a school and are found to be in need of bilingual instruction, the School Department shall provide it. Parents who seek bilingual instruction for their children at any grade level shall note this on the enrollment application form which the School Department shall mail to them. However, the School Bilingual Department staff shall make the decision to *assign* students to programs, but not to specific schools within Community Districts. Bilingual program assignments will be the first made by the Assignment Unit.

Special Needs Students

[41] Every school facility shall receive and educate mild and moderate special needs students, who will be assigned to schools in accordance with regular assignment procedure by geocode. No less than one resource room and one special needs services space shall be set aside in each school. Each school shall have special educators and materials. Some moderate and severely handicapped students will be assigned directly to schools with special facilities and staff, apart from the geocode procedure. To support special education both in regular schools and in special resource schools, at least three such special schools in each community district shall be identified and planned by the School Department, for review by representatives of the court, not later than July 15, 1975. No special school shall consist wholly or primarily of special needs students.

Capacities and School Closings

Every school facility shall house a student body that does not exceed the total capacity ceiling shown in the tables in the plan in order to avoid overcrowding and enable objective assignment by geocode units. The capacity ceiling makes no distinction between the variable seat requirements for kindergarten, special needs, bilingual, and vocational programs. This must be left to the planning discretion of the School Department. The ceiling capacity figure need not be met in any particular school, to enable this planning for program differences. The ceiling capacity limit is in no way prescriptive with respect to setting or influencing variable standards for establishing class size or teacher/student ratios.

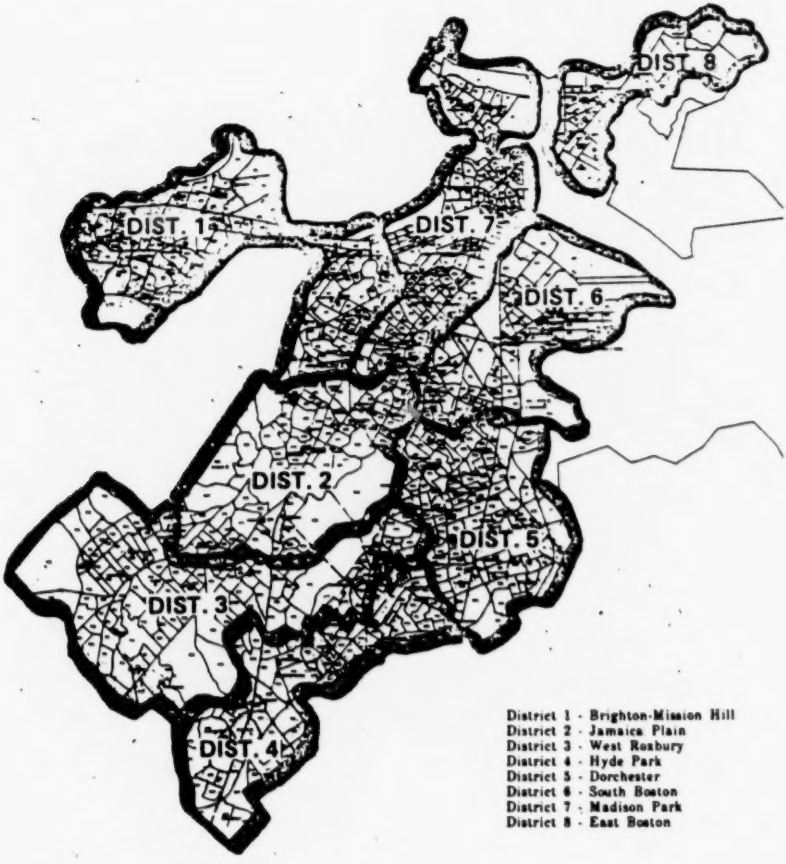
The School Committee is ordered to close permanently the following schools [2], not later than August 30, 1975, in order to enable and maintain desegregation through the consolidation of student bodies: (Names of schools omitted).

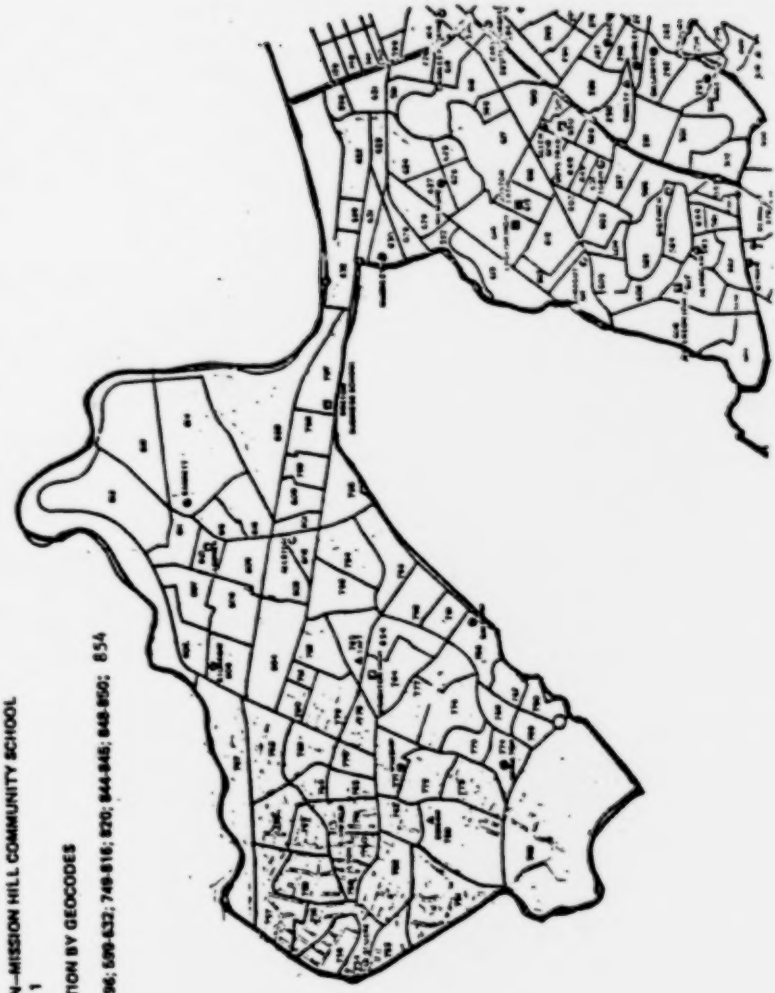
Maps, Tables, and Planning Specifications

The following maps show the boundaries, official names, and geocode units included within each of the eight Community School Districts. The base map was drawn some time ago and shows some schools now closed and others to be closed. A geocode is a bounded area of from five to fifteen residential blocks within a District and may contain anywhere from a half dozen to several hundred public school students. The geocodes were originally developed as reporting units for use by the Boston Police Department and are now used by the School Department for planning purposes. In this plan, they shall provide the basis for assigning students to schools.

2. The decisions to close these facilities were made after consideration of their locations in areas with excess seating capacity at the elementary level, of their conditions and presence on various lists of schools recommended for closing in the past, and of equity in the burden of school closings among districts and among ethnic groups.

One table accompanying the map of each Community School District lists the school facilities for the District, together with the limit on capacity for each facility, the designation of numbers of students to be accommodated in bilingual program clusters within particular schools, and, in the lower right hand corner, the total available seats at each level. A second table summarizes the population composition of students residing in the District who are enrolled in public schools as of April 10, 1975. The bottom line states the racial and ethnic compositon of the Community District to which the percentage variations permitted by the guidelines for assigning students relate. Following the tables is a summary of planning specifications for each District.





BRIGHTON—MISSION HILL COMMUNITY SCHOOL DISTRICT 1

COMPOSITION BY GEOCODES

283; 540-596; 599-632; 748-816; 820; 844-846; 848-850; 854

TABLE 1.
BRIGHTON-MISSION HILL COMMUNITY SCHOOL DISTRICT 1.

School	Limit On Capacity	No. Bilingual Students	
1. Brighton High	1200	Chinese Hisp.	100 120
2. Edison Middle	750	Chinese Hisp.	60 100
3. Taft Middle	850		
4. Baldwin	400		
5. Barrett	180		
6. Farragut	290	Hisp.	40
7. Gardner	550	Hisp.	100
8. Garfield	450		
9. Hamilton	380	Chinese	60
10. Lyon	200		
11. Oak Square	130		
12. Storrow	100		
13. McKinley	130	Hisp.	40
14. Milmore	190	Hisp.	40
15. Tobin	630	Hisp.	100
16. Winship	460	Hisp.	100

High School Total	1200
Middle School Total	1800
Elementary School Total	4090
Totals	6990

BRIGHTON-MISSION HILL DISTRICT 1 1974-75 STUDENT ENROLLMENTS[1]

Grade Level	No. Students White	Black	Other Minority	Total	% W	B	OM
$K_1 + K_2$	572	234	289	1095	52	22	26
1 - 5	1345	1366	923	3634	37	38	25
6 - 8	789	641	388	1818	43	35	22
9 - 12	1188	677	410	2275	52	30	18
13	119	24	69	212	56	11	33
K - 13 Total	4013	2942	2079	9034	44	33	23

1. Data filed by School Department Data Processing Center and Educational Planning Center on April 10, 1975. Includes any student enrolled anywhere in Boston public schools, but residing in this District, and attending one or more days since September, 1974.

PLANNING SPECIFICATIONS FOR BRIGHTON-MISSION COMMUNITY SCHOOL DISTRICT

1. Approximately one-half of the resident high school students will need Citywide high school admissions or assignments.

2. The McKinley School shall be converted to a general elementary school from its present exclusive use for trainable and educable retardates of middle and high school age. So that no hardship is created for McKinley's present students, however, this change shall be gradual and phased so that current students may complete the program. A plan for accomplishing this shall be filed with the Court representatives not later than August 1, 1975. The plan shall include identification of future facility provisions for retarded youths.

3. The Taft Elementary School shall be converted for use as part of the Taft Middle School.

4. Twenty-five percent of the seats in the Jackson portion of the Citywide Jackson-Mann School, in Hennigan School, Boston Trade High School and English High School shall be reserved for residents of this District.

(Maps, tables and planning for Community School Districts 2-8 have been omitted.)

B. THE CITYWIDE SCHOOL DISTRICT

Definition and Purposes

Citywide School District 9 shall comprise those schools offering distinctive programs of instruction that may serve the needs and interests of students residing anywhere within Boston. Citywide schools range from those offering admission by examination to those targeting their services at students eligible for Title I federal aid. District 9 shall be organized like the Community School District, with a Citywide Superintendent, a District office, a Council of Principals and a Community District Advisory Council.

The purposes served by the Citywide School District are identical to those

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set forth for Community School Districts, with these additions: The Citywide District shall facilitate the establishment of a substantial sector of the school system within which complete desegregation with relatively slight deviations from systemwide racial ratios is accomplished on the basis of the magnetic attraction of the programs of instruction. These programs are intended to address a wide range of needs and interests and to respond to them educationally in ways that unify all groups within the city.

The provisions of the plan contained in the previous section dealing with Community District Schools, e. g., administration, curriculum, bilingual and special needs students and capacities, shall apply equally to District 9 schools except where inconsistent with particular provisions contained in this section, e. g., the six grade structure of Latin School and Latin Academy.

Options and Applications

[42] The School Department shall, under the court's supervision, prepare an "Orientation and Application Booklet." The booklet shall be printed for mailing in an English and Spanish version and in a Chinese version. The English-Spanish version shall be mailed to the parents or guardians of all students enrolled in the public schools. The Chinese version shall be mailed to the parents or guardians of students identified from enrollment lists as Oriental. Translations into French, Greek, Italian and Portuguese shall be printed for distribution and copies of the booklet in these languages as well as in English-Spanish and Chinese shall be made available at local schools, Community School District offices and at other municipal locations. A statement in each language shall appear in the English-Spanish booklet mailed to parents and students informing them of the availability and location of copies in these languages. The orientation section of the booklet shall present brief but cogent descriptions of all of the schools and their programs within Citywide District 9 and shall orient readers accurately to school resources and to the range of options and restrictions governing final assignments.

The enrollment application section shall instruct the parents or guardians of all prospective students under 18, as well as the student who is 18 or over, in how to apply for the schools and programs the student prefers. Prior to mailing the booklet, the School Department shall conduct an orientation program within the schools and through the media. The School Department shall conduct and encourage conferences and planning sessions between staff, parents, students, and civic leaders to explore and develop the full implications of magnet programs. After the booklets have been mailed, there shall be an information and guidance center located in each Community School District office to which parents and students may direct inquiries. The address and telephone number of each center shall be printed in the booklet.

The application portion shall include a request that is obligatory for responses as to student's age, ethnicity (white, black, Hispanic, Oriental, American Indian, or other); address of residence; last school and grade attended; special learning or treatment needs; Title I eligibility; home language; and other data the School Department deems essential for processing the applications. The application shall present parents and students with the following options[3]:

a. Preference for assignment to the Community School District schools with the specific school *not* named.

b. Preference for one or more specific Citywide District schools, or programs and shall provide an opportunity for the parent or student to request further information about the programs.

3. METCO, EDCO, or similar programs shall not be offered as options, but the booklet shall inform readers of the nature of such

grams within such a Citywide District school.

The application shall inform parents and students that all currently enrolled students (except current 12th and 13th graders) will be assigned to the extent possible on the basis of their preferences, but that if the application is not returned before the deadline for doing so or omits essential information, the student will be assigned to a school without having his or her preferences considered in the initial assignment process. The application should also state that students not currently enrolled who seek to enroll for the 1975–76 school year, who do not submit an application by the deadline for doing so will be permitted to express preferences but will have to be assigned on the basis of available seats. The booklet shall inform readers that citywide magnet preferences are not guaranteed, nor is assignment to a Community District school; and that the school to which each Community District student is admitted *cannot* be identified until notification is made in writing to the parent by the School Department.

The enrollment application shall be printed in such a manner as to be detachable and returnable by prepaid mail to the School Department. Students and parents shall be given ten days in which to study, complete and mail the Application. The School Department shall notify all applicants and currently enrolled students of their admission assignments in writing by mail not later than 21 days after the application's return deadline has expired.

The most crucial feature of this three-step procedure is the reservation to the School Department of the power to assign the applicant to a specific school and program in a school. As the Timetable of Performance, *infra*, makes plain, the analysis of applications and the assignment of pupils to schools and programs will be supervised by the court.

Examination Schools

Citywide schools range from the three examination schools with special entrance requirements, to the Title I eligible subsystem schools, to schools which have achieved distinction in offering unique programs at all levels. Some of the schools are now being erected, for use in 1976.

Boston Latin School and Bostin Latin Academy will continue for the school year 1975–76 to provide a six-grade program and to accept both 7th and 9th grade students. At least 35% of each of the entering classes at Boston Latin School, Boston Latin Academy and Boston Technical High in September 1975 shall be composed of black and Hispanic students. The School Department may utilize the scores of applicants on the SSAT, alone or combined with students' grade point averages or standings as criteria for admission. The School Department shall exercise its judgment in setting criteria such as a minimum SSAT score or relative weights to be given to scores and grades, so long as the criteria chosen result in entering 7th and 9th grade classes at least 35% black and Hispanic. These orders apply only to the 1975–76 school year and are subject to change both as to grade structure and admissions criteria, dependent upon an ongoing evaluation of racial data and of the effect of this admissions program upon the desegregation of the examination schools.

The School Department shall also institute and conduct programs (a) to make all students in the system aware of the admission requirements and type of instruction offered at the examination schools, and (b) to recruit black and Hispanic applicants to the examination schools in future years.

Any tutorial programs given to prepare students for entrance examinations shall be conducted on a desegregated basis, as shall advanced work classes (if they are to be continued). Any

enrichment and remedial programs for students admitted to or enrolled in the examination schools shall be available and conducted on a desegregated basis. There shall be no tracking of students within the examination schools which results in racially segregated classes.

Institutional Support

Institutions of higher education and culture, business corporations, labor unions and other organizations in the Greater Boston area have committed themselves to support, assist, and participate in the development of educational excellence within and among the public schools of Boston. These institutions shall not be asked or required to make grants of their funds, or to be responsible for administration. There is no wish or intention on the part of the court or of these institutions to usurp or replace the proper role of the School Department or any of its employees; their sole purpose is to benefit the public school children of the city.

The court has matched colleges and universities with particular high schools, both community and citywide, and with selected other schools and programs, in ways that fit the capabilities and needs of the partners. Other colleges and universities may be added as this Plan is implemented. In addition, businesses have been explicitly paired and associated with schools. The leadership of the Boston Trilateral Task Force, composed of business and other concerned institutions, has pledged itself to continue and enlarge this kind of support in order to supplement academic theory with business practicability.

Labor organizations have expressed a readiness to support and assist in occupational, vocational, technical, and trade education, and planning for some programs has already begun. The court will foster paired relationships in similar detail at a later stage in the planning. A committee of the Boston Bar Association has assisted the court in developing institutional support and will continue to do so.

The Metropolitan Cultural Alliance, a membership organization of 110 cultural institutions, has also renewed its commitment to continue its support and assistance to schools in the Citywide District as well as in several Community School Districts. The Alliance made a major contribution to the implementation of the state plan in 1974–75 by working with thousands of students and hundreds of teachers. This work will continue to expand and improve. Its major impact will be upon Citywide magnet programs.

The pairings listed below shall enable participating institutions of higher learning to share in the direction and development of curriculum and instruction under court-sanctioned contracts with the School Department. These contracts shall be unique to each institution and its matching school. They shall set forth the scope of authority of the parties and the role to be played by each in educational program planning, curriculum development, instruction, research, and the like. The city defendants shall use their best efforts to negotiate a contract pertaining to each school listed below acceptable to both the Boston School Committee and the contracting institution of higher learning. Good faith discussions and negotiations are already in progress between college and university representatives and School Department personnel, in cooperation with an Ad Hoc Committee of three attorneys appointed by the court on April 15, 1975. Jurisdiction is reserved to enter additional orders in this area should they become necessary.

Several of the colleges and universities are currently conducting programs, some of long standing, in various schools. The pairings listed below do not supplant programs either already in operation or planned independently of this plan. Also, some undertakings may overlap, e. g., a college may work in a high school located in a district where a different college has general responsibility. In order to promote understanding of the

roles of paired educational and business institutions, the Orientation and Application booklet shall include language substantially as follows:

"To assist the school department in its efforts to improve the quality of education in the Boston school system, many colleges, universities and businesses in the greater Boston area are collaborating with individual schools, most but not all at the high school level, in designing and implementing new programs of instruction and strengthening existing programs. Cooperation from the business community began last year in the form of a Tri-Lateral Task Force whereby particular companies were paired with particular schools. Other businesses have since volunteered to enter into "pairings" with schools, and labor organizations have also shown interest in helping.

"Along similar lines, beginning in April of this year colleges and universities have been paired with the schools listed below and collaborative efforts have begun toward making various planning and educational resources of area colleges and universities available to the particular schools listed, in the hope of formulating and implementing magnet type educational programs of the general description indicated. The process of planning and developing new educational programs is a complex and continuing one. It is impossible to predict what programs now in the planning stage will have been developed completely by the fall of this year. However, a great deal of effort is currently being expended in the hope that new programs may be ready for enrollment in the fall of this year or later during the 1975–76 school year. Furthermore, magnet-type programs which were in existence during the 1974–75 school year, which are also listed below, will continue and in some instances will have been expanded by the time schools open next fall."

There follows a list of the college and university pairings:

(Names of participating colleges and universities and schools with which they are linked omitted.)

The Tri-Lateral Task Force, made up of business leaders, has been working with the Boston School System since June of 1974 to improve the quality of education. This represents a substantial commitment of the talent, resources and experience of the Boston business community to the city's high schools. The pairing of businesses with high schools, similar to the pairing of institutions of higher learning, will establish a degree of responsibility and identification resulting in a genuine commitment to heightening the effectiveness of each school.

Participating Business Organizations

The list of businesses which have agreed to assume a responsibility for a specific school and the tentative pairing with high schools is as follows:

(Names of businesses and schools omitted.)

Citywide Schools and Programs

All Citywide schools except the English Language Center and the examination schools, shall reserve 25 percent of their seats for students residing in the Community District in which the school is located. There follows a listing of the schools that comprise the Citywide School District, together with the court's designation of the program of instruction to be featured in each. Program features were developed on the basis of descriptions provided by the School Department combined with modifications introduced by the court for the purpose of enhancing the desegregative power of the schools as magnets:

High Schools

1. *Boston High School.* Limit on capacity: 600. This school features work/study, or cooperative education. Its students must be employable, so that the close relationships established with businesses and other employers may be sustained. The academic program of the

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school will constitute a comprehensive high school program commensurate with state requirements. The work program entails paid employment and coordinated supervision. Hispanic bilingual instruction shall be provided.

(Programs in 25 other Citywide schools and provisions for vocational education omitted.)

D. GUIDELINES FOR ASSIGNING STUDENTS

Assignments shall be made by a staff unit designated by the Superintendent, under the supervision of court representatives.

Applications

[43] The parents of each prospective student, or the student if 18 or older, will be asked to indicate preferences among school assignments. At the elementary and middle school levels, parents should rank up to three preferences from among the citywide schools and a community district assignment. Assignment to a community district school is guaranteed at the elementary and middle school levels, for any student who prefers such an assignment or who indicates no preference. At the high school level, the parents or student should rank three preferences among the citywide high schools and a community district assignment. The admission process will attempt to honor these indicated preferences.

Assignments to Community District Schools

[44] The basic unit for assignment shall be the geocode, i. e., except where specifically provided, all students shall be assigned to community district schools on the basis of the geocodes in which they reside. Geocodes may be divided into as many as three parts, but only where such a division aids in achieving the assignment goals. Each community district school shall have assigned to it geocodes that lie within the district, so that each school's racial and ethnic composition generally reflects the percentages of white, black and other minority students, kindergarten through grade 13, who reside in the district. Assignments of geocodes to schools should avoid, wherever feasible, dividing neighborhoods that are ethnically integrated, and should attempt to minimize the transportation of students.

[45] Where necessary in order to fit students assigned by geocode units to seat capacities, to make allowance for geographical obstacles and transportation routes and to minimize mandatory busing, the composition of schools within a district may vary within ranges to be determined by computing the white, black and other minority shares of the District's student population and multiplying the resultant percentages by 25 percent. For example, white students residing in Brighton-Mission Hill District 1 make up 44 percent of the District's school population. Under this guideline the extent of permissible variation is determined by multiplying 44 by 25%; the extent of permissible variation thus is 11 percentage points. While the desired norm shall be 44 percent, the percent white students in District 1 community schools may, where necessary, range between 33 and 55 percent. The tolerances provided here, based on the size of each group, assure protection against disproportionate isolation for the smaller groups within each district, while providing the latitude to minimize mandatory busing and ease the matching of geocodes to school capacities, consistent with desegregation.

Exceptions to these variation limits shall be permitted where necessary to allow appropriate bilingual assignments or to allow students in any racial or ethnic group to be assigned to a particular school in groups of at least twenty. As a result, some schools may have no other-minority students in attendance.

Certain students will be assigned without the use of geocodes. Students in need of bilingual education or special education will be assigned individually to appropriate programs within the district of residence. High school students

entering their year of graduation in the fall of 1975 and students wishing to continue participation in a vocational program will, if they request, be assigned to the school attended in the previous year, even if that school lies outside the applicant's district of residence.[4]

Admissions and Assignments to Citywide Schools

Admission and assignment of students to citywide schools shall be on an individual basis, not by geocode. They shall grant student preferences to the extent possible while at the same time achieving a racially desegregated student body, providing seats for high school students from districts with overcrowded community district high schools and assuring that the compositions of commmunity district schools remain within the ranges set for those schools. Admissions and assignments shall be made under the supervision of representatives of the court, and will be reviewed by the court.

[46] Admissions and assignments shall be carried out so as to achieve racial and ethnic compositions at citywide schools closely reflecting the racial and ethnic composition of the school system as a whole. The white and combined black and other minority percentages at each citywide school shall be within five percentage points of the systemwide percentages (projected as 51% and 49% respectively for 1975–76), thus allowing a range of ten percentage points (56% to 46% white and 54% to 44% combined black and other minority for 1975–76). Other minority students may make up as much as but no more than 30% of admissions, and no minimum percentage will be required, but where possible black and other minority students will be admitted to each citywide school in proportion to the systemwide black and other minority percentages (37% black and 12% other minority for 1975–76).

These admission guidelines for citywide schools are subject to three exceptions: (a) Students entering their year of graduation in the fall of 1975 shall be assigned to the school attended in the previous year, if they elect that school as their first preference. (b) The Hernandez school, which contains a citywide Spanish-English bilingual program, may enroll a student body up to 65% Hispanic. Non-Hispanic other minority students will be eligible along with white and black students, within the remaining 35% of school capacity. (c) The examination schools are subject to independent desegregation requirements for the 1975–76 school year.

Citywide assignments shall be made in a manner that avoids carrying any community district school's composition beyond the variation limits for white and black students set in the section governing community district school assignments.

If a citywide school is oversubscribed, applicants shall be admitted in the following order of priority: applicants residing in the community district where the citywide school is located, up to 25% of the school's capacity; applicants who attended the school in the preceding year; high school students whose community district school is, or during the assignment process, remains oversubscribed; all other applicants.

Applicants shall be selected from among students in the same category of priority, on the basis of the preference rankings entered on their enrollment applications for the particular citywide school (e. g., a first preference for a particular school will outrank a second preference for the same school); further admission selections shall be made at random, except to the extent necessary to prevent overcrowding at the community district schools or departure in community district schools from the variation limits for white and black students set in the section governing community district school assignments.

If high school students do not elect to attend citywide high schools in num-

4. For the assignment of kindergarten students, see *ante*, p. 251.

bers sufficient to prevent overcrowding at community district high schools, high school students shall be assigned to citywide high schools to the extent necessary to prevent overcrowding at community district high schools, using the following method: from each racial or ethnic group of applicants for admission to an oversubscribed community district high school, students shall be selected at random for admission to the community district high school until the school is filled to the capacity set in this plan in accordance with the racial and ethnic percentages and permissible variation limits for that community district. Students not admitted to the community district high school to which they applied shall be assigned to citywide high schools, honoring preferences entered on enrollment applications where possible and in all other cases placing the student at the citywide high school opening nearest to his residence in keeping with the guidelines applicable to citywide schools generally.

A master list of all prospective enrollees shall provide the basic resource for implementing the assignment procedure. The list shall be developed by the School Department alphabetical list of students filed April 10, 1975 by the school committee, as revised by the addition of and supplemented by geocode designations and the reconciliation of data on the list with data obtained from the enrollment application forms.

Transfers

A student may transfer from one school to another with a suitable opening only when the transfer, whether intradistrict or interdistrict, would diminish racial imbalance, i. e., move the racial composition of the more racially imbalanced of the two schools closer to the systemwide racial composition. Transfers may also be made to provide students with appropriate bilingual or special education services and for purposes and under conditions authorized by the court in orders entered in these proceedings during the fall of 1974.

E. TRANSPORTATION

Students are assigned to schools on the basis of community districts on the one hand and citywide magnet schools on the other. Within any Community District, the average distance from home to school will not exceed 2.5 miles, and the longest possible trip will be shorter than 5 miles. Bus travel times will average between 10 and 15 minutes each way, and the longest trip will be less than 25 minutes. Students bused at one school level such as 1 through 5, will be assigned to walk-in schools at the next level such as 6–8, wherever possible.

[47] The court finds that an adequate remedy in this case must involve mandatory transportation of students. 20 U.S.C. § 1755. Mandatory transportation by chartered bus refers to the service that the School Department shall provide for students assigned to elementary schools which are more than 1 mile from home; for middle school students who live more than $1\frac{1}{2}$ miles; and for students assigned to high schools who live more than 2 miles from the school. The reason for mandatory transportation may be distance, safety, or controlled transfer, or a combination of these. For high school students assigned to schools within ready reach of mass transit, the School Department may fulfill its obligation by providing for free use of buses and subways. Mandatory bus transportation will be required for approximately 21,000 students, as follows:

Grades	Total Students	To Be Bused
1–5	33,773	12,000
6–8	17,106	5,000
9–12	21,370	4,000
	72,249	21,000

Because of the use of district boundaries, between one-third and one-half of students bused mandatorily will travel shorter distances than students totaling approximately 17,000 who are bused

mandatorily under the state plan currently in effect.

Assignment of every student to the school closest or next closest to his residence, considering only school capacity, natural physical barriers or both, along with grade level and the type of education provided, cannot achieve substantial desegregation in Boston due to the geography of the city and racial and ethnic distribution in the city. 20 U.S.C. § 1713(a), (b), § 1714. Revision of attendance zones and grade structures, construction of new schools and the closing of old schools, a controlled transfer policy with limited exceptions and the creation of magnet schools have been used in the formulation of the plan here adopted in order to minimize mandatory transportation. 20 U.S.C. § 1713. The court finds, however, that some transportation of students to schools other than those next closest to their residences is required to remedy adequately the denial of plaintiffs' constitutional rights and to eliminate the vestiges of a dual school system in Boston. 20 U.S.C. § 1702(b), § 1714(a). The court has required no transportation, however, that would pose a risk to the health of students or impinge on the educational process for those students due to excessive time or distance travelled. 20 U.S.C. § 1714(b).

The School Department shall prepare a transportation plan and file it on or before July 7, 1975 for review by and approval of the court. After notice the court will hear the parties on the question whether a consultant in modern transportation engineering should be appointed to assist and supervise preparation of a transportation plan providing the safest, shortest and cheapest routes and stops for every District.

F. COST CONSIDERATIONS

The plan will require the use of approximately 420 buses, if planned transportation routes develop like those used in 1974–75. On these assumptions the busing costs, computed at $100 per bus per day, would total approximately $7.6 million per year. More precise route and stop planning might reduce this by $1 million per year. Virtually all of the costs of mandated transportation under this plan are fundable by the State Board of Education. Such costs will amount to less than 7 percent of the school committee's annual budget, and in this respect are well within the national average school district outlays for transportation.

The plan allows completion of those projected and ongoing school facility construction projects which are noted in the section on school closings and in the sections containing planning specifications. Proposals for other facility replacements shall be filed by the Public Facilities Department or the School Committee for court review, and will be approved where they are necessary for health and safety reasons or for desegregation.

The plan orders that 13 schools which are open this year and 11 now unused be closed permanently. Savings in fuel and maintenance expenditures will be realized from these closings. Efficient utilization of space will be possible in an estimated 70 elementary schools which are now fully heated and maintained, but under-enrolled.

The plan has as a goal voluntary desegregation through the Citywide District schools and the application process for registering program preferences. Roughly one-fourth of all students may be located in schools by parental option. This may enable safety and enforcement expenditures to be reduced from those incurred during 1974–75.

The plan requires new expenditures for a Citywide Education Council, Community District Advisory Councils, District office staff and equipment, and for increased numbers of school administrators. Staffing can be achieved from within the existing complement of personnel, and through normal methods of replacing resigning and retiring personnel. Staff development costs for the

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plan will include outlays for minority recruitment and hiring previously ordered, and staff training in human relations and for new assignments in changing programs.

By obtaining institutional support through school pairings, savings in support and assistance costs may be realized and new external revenues generated. these institutions may serve as fiscal agents for research, teacher training, curriculum, and program development grants and contracts.

The treatment in the plan of special needs students conforms with state law and enables the Boston public schools to qualify for federal and state aid for special education.

With the implementation of the plan, the Boston public school system may attract more funding from public sources and from increased numbers of private sources.

G. CITIZEN PARTICIPATION, MONITORING AND REPORTING

Citywide Coordinating Council

Membership

A Citywide Coordinating Council (CCC) will be established having approximately 40 members appointed by the court. The membership will include members of the white, black, Hispanic and Asian ethnic groups, parents from all sections of the city and persons from educational, business, labor, civic, religious and community organizations. Two members of the Citywide Parents' Advisory Council (CPAC) will be members of the CCC, as will two students to be selected from Racial-Ethnic Student Councils. Most, but not all, CCC members will be residents of Boston; all will be persons deeply concerned with the welfare of the city and its school system. Diversity of views regarding school desegregation will be sought consistent with willingness to support the responsibilities of the council. Members of the CCC will be appointed to serve through June of 1976. The court will appoint an interim CCC chairperson and subcommittee chairpersons for a period of 60 days, during which time the CCC shall hold elections for these positions.

Purposes

The CCC will foster public awareness of and involvement in the process of implementation of the court's desegregation orders. It will be the primary body monitoring implementation on behalf of the court. It will in this connection file monthly reports with the parties and the court covering its activities. It will attempt to avoid the difficulties caused by lack of preparation and community education associated with the state plan currently in effect. It will work to develop the cooperative efforts of universities and colleges, cultural institutions and business and labor organizations with the Boston schools. The CCC will attempt to identify and resolve problems by mediation and conciliation. In its actions, it will act with awareness of the needs of non-English speaking groups and communities in the city. It may bring unresolved problems to the attention of the parties, the court or other appropriate persons. It may communicate and publicize its views and recommendations to the public, the parties and the court. The CCC will not co-manage or make policy for the Boston schools. Neither will it assume the responsibility of the Boston school committee and superintendent and other defendants to carry out the court's orders.

Organization

Separate subcommittees of the CCC will deal with each of the following areas:

(1) *Public information*—the provision of accurate and adequate information concerning all aspects of the desegregation plan and process.

(2) *Monitoring*—assuring compliance by all parties with the court's desegregation orders and monitoring of other

aspects of the desegregation process [5] through the administration and extension of the present monitoring program established by the Community Relations Service.

(3) *Community Liaison*—exchange of information and assistance between the CCC and business, civic, neighborhood, religious and academic groups and agencies; coordination of efforts and stimulation of new efforts from these groups when and where needed.

(4) *District Council Liaison*—development of a plan for formation and operation of Community District Advisory Councils; liaison with local councils when established.

(5) *Education Programs*—support of efforts to improve quality education; addressing problems in the desegregated provision and accessibility of various programs, including bilingual, special needs, magnet school and vocational programs; liaison with universities, colleges, cultural, business and labor groups involved in mutual assistance arrangements with the school committee and department.

(6) *Public Safety and Transportation*—monitoring of the development and implementation of safety and security procedures and of human relations programs and other training in connection with desegregation.

(7) *An executive committee* composed of the CCC chairperson, the subcommittee chairpersons and one member of the Citywide Parents' Advisory Council will conduct CCC business between meetings of the full council, receive subcommittee reports and recommendations and authorize and approve subcommittee activities. It will formulate bylaws and establish quorums and other procedural rules for the CCC and the subcommittees. The bylaws may provide for co-chairpersons or vicechairpersons of the CCC and its subcommittees and for their immediate election, in which event they shall assume office immediately and share responsibility with the interim chairpersons appointed by the court to serve for 60 days. A member of the Community Relations Service of the Department of Justice shall be permitted to attend and participate in meetings of the executive committee in a non-voting capacity.

The Boston school committee and superintendent shall meet with the executive committee of the CCC at least once each month in open session to discuss progress in implementation of the plan and resolution of problems identified by the CCC. The school committee shall provide the CCC with copies of agendas and minutes of all school committee meetings.

Meetings

The CCC will meet at least once each month and the subcommittees at least twice each month. The agenda for CCC meetings shall be prepared and publicized in advance. The CCC will act in open session and any written reports to the court will be public. The Community Relations Service of the Department of Justice will provide technical assistance to the CCC and a member of the Service shall be permitted to attend and participate in meetings of the CCC and its subcommittees in a non-voting capacity.

Powers and Authority

The CCC will be the monitoring body for the court. The CCC shall have the power to discharge its responsibilities adequately, including the authority to hold public meetings, conduct hearings, make written reports and make inspections of school facilities. The parties shall cooperate fully with the CCC and provide its members with reasonable access to information required for its work. The CCC may submit recom-

5. Such aspects, which may not be covered by specific court order, may include school committee policies, administration and staffing, curriculum and instruction, discipline, transfer procedures, police-school relations, budgeting and allocation of resources and teacher and student human relations training.

mendations and reports to the court and shall file monthly reports with the court beginning July 1, 1975.

The CCC shall have staff assistance including a staff director and necessary secretarial and clerical personnel, all of whom it will select, appoint and fix compensation for, subject to court approval. It will have permanent office space not associated with any party or the court. Salaries and other expenses of the CCC, including expenses of the monitoring program which have been approved by the court, shall be paid by the city defendants.

Community District Advisory Councils

A community district advisory council will be established in each district, including citywide school district 9, no later than one month after the opening of school in the fall of 1975. (The citywide district's advisory council is included in all references to community district advisory councils.) Each district council shall include 10 parent representatives who shall be elected at a meeting of the Racial-Ethnic Parents' Councils of all the schools in that district from among their members; two student members will be elected by the Racial-Ethnic Student council members of the district's schools from their membership.[6] A district council may contain no more than 20 members including representatives of teachers, police, school department administration, business, university, labor or community groups. The CCC will nominate such representatives as reflect the composition of the school population and needs of the district for appointment by the court to complete each district council. Each district council will develop as soon as possible, preferably within two weeks of its establishment, by-laws concerning quorums and meeting procedures. District council members shall elect a chairperson from its membership to preside at council meetings, which shall be held at least once each month. Meetings may be held in the office established for each district by the school department. There shall be a secretary located in that office who will work for the council. Vacancies in elected membership will be filled by elected alternates; vacancies in appointed positions will be filled by the court from nominations of the district council endorsed by the CCC. The district councils will act as an advisory group to district school department personnel and will monitor implementation of the plan on the district level. Reports of CCC monitoring will be sent to the appropriate district council. Unresolved matters may be brought by district councils to the CCC, which will supply assistance and supervision to the district councils. Reasonable access to information shall be given to district councils by the parties.

Racial-Ethnic Parent Councils

The establishment and operation of Racial-Ethnic Parent Councils (RPCs) in each school, as set out in the court's order of October 4, 1974 and amendments thereto, shall continue. Additional schools which in 1975 meet the criteria for establishment of RPCs shall elect RPCs. The RPCs will continue to provide mechanisms for concerned parents to address racial problems in their children's schools. Their role will be expanded to include electing parent representatives and alternates to the community district advisory councils.

The Citywide Parents' Advisory Council (CPAC) similarly will continue to provide support and communication to the local RPCs. It will be increased in size according to the number of districts established by the court's plan, so as to continue to be composed of two members from each district, and will also contain two Hispanic and two Asian-American parent representatives to be

6. Schools where in the fall of 1975 the criteria for establishment of Racial-Ethnic Parent and Student Councils are not met may elect representatives to vote with Racial-Ethnic Council members in selecting district council members.

elected by citywide caucuses of parents and guardians of Hispanic and Asian-American students. The CPAC will elect two of its members to the CCC, one of whom will serve on its executive committee, and the CPAC will work especially closely with the community liaison subcommittee of the CCC. The CPAC will remain the body exclusively composed of parents concerned with resolution of racial problems within the schools.

Reports

Appropriate school personnel shall participate with Community District Advisory Councils and with school Racial-Ethnic Parent Councils in developing during the course of the school year an annual report of progress covering that school. The Superintendent shall file with the court on or before February 1, 1976 a report stating the procedures instituted, responsibilities delegated and forms devised for the purpose of compiling information to be contained in the annual reports. These individual school reports shall be analyzed and consolidated by the District Superintendent in each community school district and in the citywide school district, with the assistance and participation of the Community District Advisory Council. The Superintendent shall file with the court annually on or before July 15 a report covering the entire system for the previous school year. Copies shall also be sent to the CCC and shall be available to the parties and to interested citizens.

The report shall contain racial and ethnic data and other information on each school, each district, and systemwide covering:

1. The number and percentage of students in each racial or ethnic category by grade in each school, and by grade level in each district and systemwide.

2. The number and percentage of faculty in each racial or ethnic category by grade (or subject taught) in each school, and by grade level in each district and systemwide.

3. The number and percentage, in each racial or ethnic category, of other staff within each job classification, including transitional aides, bus monitors, attendance supervisors and custodial staff, at each school, in each district, and in the system as a whole.

4. The length of experience of faculty and numbers of faculty with permanent or provisional status at each school, and by grade level in each district and in the system as a whole.

5. The number and percentage, in each racial or ethnic category, of administrators within each job classification, at each school, in each district, and in the system as a whole.

6. The number of students suspended and the length of their suspensions, and the number expelled, in each racial or ethnic category, by month of suspension or expulsion.

7. In each racial or ethnic category, by number of days absent (reasonably classified), the number of absentee students, and the percentage of all students in that racial or ethnic category that this number constitutes, at each school, and by grade level for each district and systemwide.

8. Student achievement information, e. g., results of reading tests, showing the number and percentage of students within each racial or ethnic category for each school and, by grade level, for each district and systemwide.

9. The number and percentage, in each racial or ethnic category, of student transfers requested and of transfers granted, by ground for transfer, e. g., desegregative, medical necessity, etc.

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10. The number and percentage of students, in each racial or ethnic category, enrolled in special programs including bilingual education, vocational programs, special education (showing the number and percentage taught in separate classrooms and the number and percentage otherwise taught), advanced work classes and others, at each school and, by grade level, in each district and systemwide.

11. The adequacy of facilities, the conversion or repairs made on facilities.

12. Plans for new schools or additions or expansions of existing facilities with projected enrollment data by race or ethnicity and a statement of how such plans will affect desegregation.

13. Plans for improvements in school facilities, staff, supplies and programs.

14. Staff training and human relations training provided to staff and students, with details as to numbers of participants, nature and length of programs.

15. The number and percentage of students manditorily transported to school, by grade and by race or ethnicity, the minimum and maximum distances travelled and minimum and maximum times of trip, the average distance and time travelled, for each school and district and systemwide totals for elementary, middle and high schools.

16. Citizen participation and involvement, including summaries of activities of Racial-Ethnic Councils, Community District Advisory Councils and Citywide Coordinating Council; use by community of school facilities.

17. Particular programs involving colleges and universities, business and labor groups and cultural institutions and types of programs conducted and numbers and percentages of students participating, by grade and race or ethnicity.

18. Budgets for areas of major expenditures during school year just ended and school year about to begin.

The report may also include other information which the Superintendent believes would be helpful or informative.

H. TIMETABLE FOR IMPLEMENTATION

The defendants, their officers, agents, servants, employees and attorneys shall take all actions necessary to accomplish the steps set out below on or before the dates listed; where filings with the court are ordered, copies shall be served on the parties and the court-appointed experts.

May 19	File print-ready copy of the Orientation and Application Booklet for parents and students.
May 20	Hold seminars on the plan for principals, guidance counselors and others.
May 27	Mail approved booklet to parents and guardians and students, stating a deadline for returning applications of June 6, 1975.
May 30–31	Hold explanatory and orientation sessions for parents, students and teachers in every District.
June 6–19	Review applications and prepare student assignments.
June 20	File proposed assignments, enrollment totals and racial compositions of each school.
June 25	Mail approved notices of assignment to parents, guardians and students.

June 25–27	Plan student and parent orientation meetings to be conducted toward end of summer.
June 30	Complete faculty and staff assignments.
July 7	File transportation plan.
July 14	Notify parents, guardians and students of transportation provisions.
July 15	File report on job descriptions, hiring procedures and orientation and training plans for bus monitors, transitional aides and other staff; and report on development of contractual arrangements with colleges and universities.
July 30	File safety and police utilization plans which shall be drafted as soon as possible in consultation with other governmental agencies; report on facilities preparations; and report on planning and arranging a two-week period of staff planning for operation of this desegregation plan which shall be the ten week days immediately prior to the opening of the schools in the fall of 1975.

The city defendants may, on or before May 19, 1975 propose alternate dates for the steps listed above nd propose additional steps they believe to be essential, with suggested deadlines.

The school department shall develop and file, on or before May 23, 1975, a detailed plan of activities, responsibilities, and internal scheduling for the implementation of the plan ordered by the court in the available time period, similar to that filed as section VII of the plan filed by the school committee on January 27, 1975. (Further remedial orders, provisions for retention of jurisdiction and appendices are omitted.)

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D. Relevant Sections of the Equal Educational Opportunitiees Act of 1974, 20 U.S.C. §§ 1701 *et seq.*

§ 1701. *Congressional declaaration of policy*

(a) The Congress declarres it to be the policy of the United States that—

(1) all children enrollled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or natiional origin; and

(2) the neighborhoood is the appropriate basis for determining public schoool assignments.

(b) In order to carry ouit this policy, it is the purpose of this subchapter to specify appropriate remedies for the orderly removal of the vesttiges of the dual school system.

§ 1702. *Congressional findiings; necessity for Congress to specify appropriate remediees for elimination of dual school systems without affecting judicial enforcement of fifth and fourteenth amendments*

(a) The Congress finds tthat—

(1) the maintenance of dual school systems in which students are assigned tto schools solely on the basis of race, color, sex, or national origin denies to those students the equal protection of the laws guaranteed by the fourteenth amendment;

(2) for the purpose of abolishing dual school systems and eliminating the vestiges thereof, many local educational agencies have been required to reorganize their

school systems, to reassign students, and to engage in the extensive transportation of students;

(3) the implementation of desegregation plans that require extensive student transportation has, in many cases, required local educational agencies to expend large amounts of funds, thereby depleting their financial resources available for the maintenance or improvement of the quality of educational facilities and instruction provided;

(4) transportation of students which creates serious risks to their health and safety, disrupts the educational process carried out with respect to such students, and impinges significantly on their educational opportunity, is excessive;

(5) the risks and harms created by excessive transportation are particularly great for children enrolled in the first six grades; and

(6) the guidelines provided by the courts for fashioning remedies to dismantle dual school systems have been, as the Supreme Court of the United States has said, "incomplete and imperfect," and have not established, a clear, rational, and uniform standard for determining the extent to which a local educational agency is required to reassign and transport its students in order to eliminate the vestiges of a dual school system.

(b) For the foregoing reasons, it is necessary and proper that the Congress, pursuant to the powers granted to it by the Constitution of the United States, specify appropriate remedies for the elimination of the vestiges of dual school systems, except that the provisions of this chapter are not

intended to modify or diminish the authority of the courts of the United States to enforce fully the fifth and fourteenth amendments to the Constitution of the United States.

§ 1712. *Formulating remedies; applicability*

In formulating a remedy for a denial of equal educational opportunity or a denial of the equal protection of the laws, a court, department, or agency of the United States shall seek or impose only such remedies as are essential to correct particular denials of equal educational opportunity or equal protection of the laws.

§ 1713. *Priority of remedies*

In formulating a remedy for a denial of equal educational opportunity or a denial of the equal protection of the laws, which may involve directly or indirectly the transportation of students, a court, department, or agency of the United States shall consider and make specific findings on the efficacy in correcting such denial of the following remedies and shall require implementation of the first of the remedies set out below, or of the first combination thereof which would remedy such denial:

(a) assigning students to the schools closest to their places of residence which provide the appropriate grade level and type of education for such students, taking into account school capacities and natural physical barriers;

(b) assigning students to the schools closest to their places of residence which provide the appropriate grade level and type of education for such students, taking into account only school capacities;

(c) permitting students to transfer from a school in which a majority of the students are of their race, color, or national origin to a school in which a minority of the students are of their race, color, or national origin;

(d) the creation or revision of attendance zones or grade structures without requiring transportation beyond that described in section 1714 of this title;

(e) the construction of new schools or the closing of inferior schools;

(f) the construction or establishment of magnet schools; or

(g) the development and implementation of any other plan which is educationally sound and administratively feasible, subject to the provisions of sections 1714 and 1715 of this title.

§ 1755. *Additional priority of remedies after finding of de jure segregation*

Notwithstanding any other provision of law, after June 30, 1974 no court of the United States shall order the implementation of any plan to remedy a finding of de jure segregation which involves the transportation of students, unless the court first finds that all alternative remedies are inadequate.

SUPREME COURT, U. S.

FILED

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1441

KEVIN H. WHITE,
Mayor of the City of Boston,

Petitioner,

—v.—

TALLULAH MORGAN, *et al.*, and
JOHN J. KERRIGAN, *et al.*,

Respondents.

BRIEF AMICI CURIAE OF CITY OF CLEVELAND AND CITY OF WILMINGTON IN SUPPORT OF PETITION FOR CERTIORARI OF MAYOR WHITE

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April, 1976

In the

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BRIEF AMICI CURIAE OF CITY OF CLEVELAND AND CITY OF WILMINGTON IN SUPPORT OF PETITION FOR CERTIORARI OF MAYOR WHITE

Filing Pursuant to Rules 42(1) and (4)

This brief Amici Curiae in support of the petition for certiorari of Kevin H. White, Mayor of the City of Boston, is filed by the City of Cleveland, Ohio, and the City of Wilmington, Delaware, pursuant to Supreme Court Rules 42(1) and (4).

Interest of Amici

Amici curiae are major cities. Amici are, or may soon be, in a position similar to that presently faced by the City of Boston. Specifically, Amici are committed to full protection of the constitutional rights of school children within

their cities. It is also incumbent upon Amici to preserve their increasingly fragile urban structures. As the petition of the Mayor of Boston demonstrates, our cities are concerned, quite legitimately, with the nature of the considerations used by lower courts in fashioning remedies in school desegregation cases. While the specific facts vary from city to city, Amici are concerned that lower courts are imposing unnecessarily burdensome desegregation plans which are neither constitutionally necessary nor reflect the practicalities of the situations. For this reason, Amici's interests are similar to those of Mayor White, petitioner herein.

Specific statements of the Amici appear in the Appendix hereto at page 1a.

Questions Presented

1. Whether the lower courts of the United States must consider, in choosing among constitutionally adequate remedies to desegregate urban school systems, factors such as cost, amount of busing, community acceptance, and potential for resegregation, in addition to the racial balance of the schools?

2. Whether the Equal Educational Opportunities Act of 1974, 20 U.S.C. §§ 1701 *et seq.*, requires lower courts, in choosing among constitutionally adequate school desegregation plans, to adopt the plan which requires the least amount of busing?

Statement

For the reasons outlined in the Appendix relating to the interest of each Amicus, the cities appearing as Amici share the concern of the Mayor of Boston that lower courts, misinterpreting this Court's decisions, have required and continue to require radical remedies to eradicate school segregation where more moderate remedies will do. Specifically, Amici are concerned that, in an increasing number of instances, the lower courts have failed or refused to consider such factors as cost, amount of busing, community acceptance, and potential for resegregation of the schools in choosing among a number of constitutionally adequate plans. Amici are also concerned because Congress, in passing the Equal Employment Opportunity Act of 1974, 20 U.S.C. §§ 1701 *et seq.*, has found that excessive busing is both educationally counter-productive and unfairly burdensome to our school children, yet lower courts have ignored that command of the Act.

For these reasons, Amici Curiae herein support the views of Mayor White of Boston and respectfully suggest that the issues presented to this Court by his petition are of national significance, affecting as they do virtually every metropolitan area in this nation. These issues are of great and growing importance to the future of meaningful school desegregation. They are worthy of this Court's consideration in depth and on the merits.

Conclusion

For the foregoing reasons, Amici Curiae respectfully urge that this Court grant the Petition for Certiorari of the Mayor of Boston and schedule this case for argument on the merits.

Respectfully submitted,

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April, 1976

APPENDIX

1. Interest of the City of Cleveland.

At the present time, an action is pending in the United States District Court in Cleveland against the Cleveland Board of Education to require massive reassignment of pupils on a racial basis. The evidence has been submitted and the case is awaiting the decision of District Judge Battisti.

The City of Cleveland is a separate legal entity under Ohio law from the Cleveland Board of Education, which has its own elected Board and independent financial structure. The City of Cleveland is not a party to the litigation against the Cleveland Board of Education. Nevertheless, the City, and its Mayor Ralph J. Perk, are concerned by the potential burden to the City which could result from the school litigation.

The legal position of the Cleveland Board of Education is that it has taken all feasible and reasonable steps short of massive pupil reassignment and consequent busing of students, to bring about truly integrated education. It is also the position of the Cleveland Board that such massive pupil reassignment and resultant unnecessary busing is not constitutionally required and would lead to resegregation, racial polarity, and substantial white flight.

In the event the trial court should rule against the Cleveland Board of Education on the liability phase of the litigation, the trial court will then consider appropriate remedies. Cleveland is concerned that any such remedy both protect the constitutional rights of its school children and consider the cost, amount of busing, and potential for resegregation. An unnecessarily broad court order in Cleveland

would create serious problems of police and fire protection, traffic control and potential loss of population with a consequent decline in its tax base. It would also impose serious new costs upon the finances of Cleveland that the City can ill afford to bear.

2. Interest of the City of Wilmington.

On March 27, 1975, a three-judge panel of the United States District Court for the District of Delaware found, based upon the standards laid down by this Court in *Milliken* v. *Bradley,* 418 U.S. 717 (1974), that "substantial governmental involvement," including the unconstitutional exclusion by the Delaware General Assembly of the Wilmington School District in its entirety from the reorganization of New Castle County school districts effected by the State Board of Education in 1968, authorized the imposition of a County-wide, interdistrict remedy for the desegregation of County schools. *Evans* v. *Buchanan,* 393 F. Supp. 428 (1975). This Court summarily affirmed. *Buchanan* v. *Evans,* —— U.S. —— (No. 75-1418, November 17, 1975). Together, these decisions set the stage for lengthy hearings as to appropriate remedy, which hearings commenced on October 20, 1975, and did not conclude until February, 1976. The District Court's decision as to remedy is now imminent.

Although the City of Wilmington is not a party to the *Evans* litigation, it shares in principle with the City of Boston the status of a defendant to the extent that certain of the proposed remedies in the Delaware litigation portend unsettling and deleterious social, economic and educational effects on the City without constitutional justification.

In its instructions to counsel governing the content of post-remedy hearing briefs, the District Court in *Evans*

directed that each party discuss the interrelationship between the plan or plans which it espouses and the provisions of 20 U.S.C. §§ 1701 *et seq.* Said provisions embody the Congressional mandate that a District Court should only impose busing as a last resort to remedy unconstitutional "... vestiges of the dual school system." 20 U.S.C. § 1713. Implicit in certain of the plans and in the post-remedy hearing brief submitted in support thereof by parties plaintiff in response to the Court's directive is the view that the priorities as to remedy established by Congress constitute a meaningless veneer which in no way clouds their view that a finding of interdistrict segregation patterns *ipso facto* justifies massive busing of pupils. Indeed, plaintiff Wilmington Board of Education, in its opening post-remedy hearing brief, specifically cites the District Court to the findings of Judge Garrity in *Morgan* v. *Kerrigan* as support for the proposition that no court need give serious consideration to less disruptive or more voluntary remedies, or combinations thereof, to which Congress has mandatorily directed our attention, because "They won't work."

As with Boston, the City of Wilmington has a concerted interest in the adoption of a remedy which minimizes the threat of disruption to both the social order and the educational process, and the further erosion of urban economic stability. This interest is wholly without protection if our district courts are granted unbridled authority to ignore the mandate of Congress as set forth in the Equal Educational Opportunities Act of 1974.

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1441

KEVIN H. WHITE,
MAYOR OF THE CITY OF BOSTON,
PETITIONER,

v.

TALLULAH MORGAN, ET AL., and
JOHN J. KERRIGAN, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS TALLULAH MORGAN, ET AL., IN OPPOSITION

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RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS TALLULAH MORGAN, ET AL., IN OPPOSITION

Respondents (plaintiffs below) Tallulah Morgan, et al., black parents and their children attending the Boston public schools, oppose the petition for certiorari of Kevin H. White, as Mayor of the City of Boston.

Opinions Below

The opinion of the District Court as it appears in the Petition's Appendix (App. 54a-108a) lacks a few parts of the desegregation plan adopted below (see App. 90a, 94a, 98a, 99a, 108a, noting omissions). The complete opinion appears in the appendix to the Boston School Committee's petition, No. 75-1445 (hereinafter "No. 75-1445, A.") pp. 57-207.

Statement of the Case

The case described in the Petition is simply not the case presented by the record.

1. The lower courts did *not* "ignore such factors as the amount of busing, cost, community acceptance, and potential for resegregation" (Petition, p. 28), but conducted precisely the analysis called for by this Court. Reduction of busing was a repeatedly emphasized goal (App. 71a, 76a, 77a, 79a, 83a, 98a, 99a, 101a, 102a). The District Court estimated (App. 77a, 101a) that its plan would bus 21,000 out of 84,000 students, as compared to 17,000 being bused under the plan then in effect, originally imposed under state law (App. 13a, 62a, 101a, 102a; *School Committee of Boston* v. *Bd. of Educ.*, 1973 Mass. Adv. Sh. 1315, 302 N.E.2d 916), and to more than 30,000 using buses or public transportation under the segregated system (App. 77a). The average bus trip under the court's plan takes 10-15 minutes, and the maximum less than 25 minutes (App. 101a). The court also made findings as to the costs —and the savings and opportunities for outside funding— required by the plan (App. 84a, 102a, 103a); it did not discuss Boston's budget (Petition, pp. 10-12), for the simple reason that the budget was not introduced into evidence by any party. Neither was there any evidence

as to "community acceptance" of varying plans, but the District Court nevertheless strove to maximize acceptance through such means as securing community participation in the framing (App. 64a-65a) and implementation (App. 86a-87a, 103a-106a) of relief, designing community school districts responsive to the needs of parents and students (App. 74a-75a, 88a-89a), providing for attractive and innovative magnet schools (App. 73a-74a, 85a-85a, 94a-99a; No. 75-1445, A. 166-74), and eliminating divisive discrimination (e.g., App. 72a-73a, 77a-78a, 89a). Avoidance of resegregation was likewise on the court's agenda, and led to the very revisions in the Masters' Plan which the Petitioner objects to (App. 75a) as well as influencing other matters (App. 76a-77a, 78a). If by "resegregation" the Petition means the theory that desegregation causes "white flight" to the suburbs, the District Court considered that aspect too, concluding that the likelihood of such flight was factually unproven (App. 71a n. 7) and legally irrelevant (App. 71a-72a).

2. The characteristics of the Masters' Plan described in the Petition (pp. 14-16, 20, 23-25) are not those of the Masters' Plan actually submitted; the real plan would have left almost half the schools in Boston segregated. It is true that the Masters projected that the districts then proposed would yield roughly the racial percentages and amount of busing described in the Petition. But new data, received after the Masters reported, made it plain that their propections were wrong, and indeed "clearly erroneous" (App. 14a & n. 13, 15a n. 14, 74a-75a). The Court of Appeals set forth the situation as follows (App. 15a n. 14):

	Masters' final report	New figures applied by court to masters' districts	Possible result of allowed deviation of ±10 percentage points within each school
West Roxbury	80% W	93% W	100% W
South Boston	60% W	67% W	77% W
Burke	50% B	63% B	73% B

These three districts contained 21, 15 and 13 schools, respectively, out of the 163 schools in the plan. (Masters' Report, App. E.)

The Masters thus took a school system which was 52% white (No. 75-1445, A. 177), and came up with a plan under which 29 schools in the Burke and Madison Park districts would be 30% or less white, while 34 schools in West Roxbury and East Boston would be 93% or more white.[1] Their plan "would define overwhelmingly white areas of the city, such as West Roxbury and South Boston, close to heavily black and Hispanic areas such as the Burke district" (App. 75a). The Masters did not try to justify this result on safety, distance, cost, or other grounds, since they—using erroneous projections—had foreseen an entirely different result. When corrected in the light of the new data, moreover, their plan had a shortage of at least 6000 community district seats, particularly in black districts (App. 15a n. 14, 75a).

The Petition's use of figures resembling the Masters' "clearly erroneous" (App. 14a n. 13) racial projections is inconsistent with the findings of both lower courts (App. 14a n. 13, 74a-75a) and with the Petitioner's own position in the Court of Appeals. His brief there conceded (p. 24 n. 1) that the Masters' projections were inaccurate, but argued that the Masters' districts could have been redrawn to yield the percentages they projected, without increasing busing or posing other problems. The Court of Appeals found this theory "significantly vulnerable" (App. 15a n. 15), and no attempt to carry it out has ever been submitted to any court.

Here, the Petitioner advances for the first time another

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[1] Under the Masters Plan (App. E), the Madison Park district (16 schools) was 30% white and the East Boston District (11 schools) was 95% white. Schools in each district could vary up to 10% from the district ratio (App. 15a n. 14). Since the students in the minority in a district would be most likely to wish to go to magnet schools or make other transfers out of the district, this leeway would probably result in still more segregation than appears in the text.

contention (pp. 19-20, 24-25). *First*, he replaces the projections made by the Masters and found "clearly erroneous" with others which resemble the Masters' projections but have never been advanced before and are still less credible. Where the Masters projected their West Roxbury district as 80% white and the lower courts found 92% or 93% white more accurate (App. 15a n. 14, 74a), the Petition asserts that this district would have been only 77% white (p. 23). The same process has occurred at the South Boston district (App. 74a; Petition, p. 23), and similar changes are made elsewhere. *Second*, the District Court's projections for its own plan (No. 75-1445, A. 127, 131, 135, 139, 143, 147, 151, 157, 177), unchallenged below, are silently replaced by slightly different figures of unclear provenance (Petition, p. 23). *Third*, the *actual results* obtained under the court's plan — not so desegregative as had been hoped[2] — are compared to the results *projected* by the Petitioner for the Masters Plan, thus retroactively vindicating the latter. The Court should not entertain this effort to disregard the findings of two lower courts on the basis of claims and evidence never submitted to them. In any event, there is every reason to believe that the Masters' Plan would have fallen short of its goals still more than the court's plan did, since it was not based on up-to-date information. In light of the new data, the Masters' Plan projections (and still more so those now advanced by the Petition for that plan) could be met only if white students voluntarily flocked to black schools in black residential areas outside their own community districts, and vice versa. The lower courts (had such a proposal been made to them) were obviously not required to rely on speculations of such a result and to disregard the data actually before them.

3. The Petition relies on numerous factual claims not supported by the record. It discusses Boston's ethnography

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[2] The figures in the Petition are, however, misleading, even assuming the propriety of comparing actual with projected figures.

(pp. 10, 17-18), budget and taxes (pp. 19-12), and public opinion (pp. 16-17). The discussion contains inaccuracies and is not supported by evidence of record, which is why the Petition relies on newspaper articles, a bond prospectus, and assertion. It later relies (pp. 22-26) on documents filed in the District Court many months after its desegregation plan was adopted, and even after the Court of Appeals' affirmance. As explained above, the Petition introduces without explanation projections for the Masters and District Court plans inconsistent with factual findings unchallenged on appeal. Nor did the Petitioner argue in the Court of Appeals that the Masters Plan's costs were relevant.

4. The lower courts did not render meaningless (Petition, pp. 28, 33) or eviscerate (p. 32) the Equal Educational Opportunities Act of 1974. The findings called for by the Act (20 U.S.C. § 1713) were made (App. 101a-102a). The Act's designation of busing as the remedy of last priority was honored by extensive and successful efforts to minimize busing (App. 71a, 76a, 77a, 79a, 83a, 98a-102a). The Act's sponsorship of magnet schools (20 U.S.C. § 1713(f)) was recognized by a magnet program at about 25 schools (App. 73a, 84a-86a, 94a-99a; No. 75-1445, A. 166-74), daring indeed in view of the failure of magnet plans elsewhere (App. 11a). The "closing of inferior schools" (20 U.S.C. § 1713 (e)) was effectuated in twenty instances (App. 83a-84a). Student transfers (20 U.S.C. § 1713(c); App. 101a) and new construction already under way (20 U.S.C. § 1713(e); No. 75-1445, A. 132, 136, 152-53, 171-72) were relied on. The Act's preference for "neighborhood" schools (20 U.S.C. § 1701(a)(2)) was fulfilled by the creation of community school districts (App. 74a, 88a-90a) more conservative than the pairing of separated areas in the inner city and outskirts approved in cases such as *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 9-10, 27-28 (1971). And the Act's mandate that "the provisions of this chapter

are not intended to modify or diminish the authority of the courts of the United States to enforce fully the fifth and fourteenth amendments" (20 U.S.C. § 1702(b)) was given its proper place in a fair construction of the Act (App. 13a-20a).

5. The Petition mistakenly suggests (pp. 19, 21) that the Petitioner was deprived of a chance to participate meaningfully in the plan's preparation. It is not true that "the court refused to admit any evidence as to community acceptance of the two plans or possible resegregation" (p.21). Such slight evidence as was offered on resegregation was admitted, taken into account in some ways (App. 75a-78a), and found unpersuasive (App. 71a n. 7) and irrelevant (App. 71a-72a) in others. Nor is it true that the parties had only one day to prepare comments on the court's proposals for changes in the Masters' Plan (p. 19). The proposals were distributed on April 17, 1975, oral comments were heard the next day, and written comments received on April 22. Even after that, parties were free to seek leave to comment further, and the Petitioner himself filed a proposal on April 29 (Motion of the Mayor etc. with Respect to the Southwest I Project).[3]

This case, indeed, presents a model of full participation in the drafting of a desegregation plan over a period of at least seven months. The local school authorities had every opportunity to frame their own plan, but even after having been held in contempt they failed to come up with anything better than freedom of choice with ineffective educational trimmings (App. 9a-13a, 62a-67a). Parties, intervenors, and numerous community groups which submitted written comments had the chance to help frame

[3] The Petition makes assertions (p. 19) about the disclosure of the proposals to the Masters, which are not based on anything in the record. Since the Masters had been commissioned only to submit their recommendations (App. 14a n. 13) and had already done so, there was in any case no need to consult with them. The court-appointed experts, however, were still on hand, and helped the District Court. (App. 50a-51a, 65a).

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guidelines (App. 63a), submit plans (App. 64a), criticize plans (*id.*), comment on criticisms (App. 65a), offer evidence, proposed findings and oral argument to the Masters (See App. 65a), comment to the Masters on their draft report (*id.*), submit written and oral critiques of the Masters' Plan (*id.*), and comment on the court's proposed revisions (*id.*). Considering that the finding of a constitutional violation occurred on June 21, 1974 (App. 62a), the court may even have allowed too much time for this process. See *Carter* v. *West Feliciana School Bd.*, 396 U.S. 290 (1970). By the time the plan was ready, the defendants could urge that it was too late for implementation in 1975. *Morgan* v. *Kerrigan*, 523 F.2d 917, 923-24 (1st Cir. 1975).

The conflicting petitions (Nos. 75-1441, 75-1445, 75-1466) filed in this Court demonstrate that this case has featured, not too little opportunity for participation, but rather too many defendant cooks, pressing inconsistent recipes on the courts. It is the Boston School Committee, an elected body, which bears the responsibility for the Boston schools except as to certain budgetary increases. 379 F. Supp. at 421-22.[4] The Committee's petition (No. 75-1445) does not challenge the student assignments ordered by the District Court except as to the three examination schools. But the Mayor (No. 75-1441) and Home and School Association (No. 75-1466) would throw the whole student assignment plan back

[4] Indeed, the Mayor's standing to file this petition is more than dubious. While the Mayor was joined as a defendant for safety and financial matters, the joinder order provided that with respect to "proposals relating to long-range desegregation plans, the primary responsibility of the City of Boston for these matters is placed with the original city defendants, the Boston School Committee and Superintendent. Therefore, the court will entertain such proposals from the Mayor only after they have been presented to the school committee. If . . . the school committee does not adopt such proposals or present them to this court through its counsel, the court will on application hear any such proposals or other motions from the Mayor." (Order Joining Kevin H. White . . . , 9/30/74). The Mayor never followed this procedure nor sought dispensation from doing so. See also *Chicago* v. *Chicago Rapid Transit Co.*, 284 U.S. 577 (1931).

into the pot. The School Committee petition asserts that the lower courts improperly sought educational improvements. The Mayor's petition, however, urges that meaningful desegregation requires "a quality education for all" (p. 32; see pp. 13, 16, 31). Meanwhile the Home and School Association, "an agency within the school department" whose participation in this case is funded by the city (1975 Mass. Acts, ch. 716), advances still a third set of claims. As the lower court opinion shows, every conceivable relevant factor and theory has been pressed in this case and fully considered.

Argument

The issues which the Petition claims to see in this case are not there. The District Court did what a court should do, taking a plan which without justification would have left numerous racially identifiable, segregated schools, and making the modifications needed to make it "promise realistically to work *now.*" *Green* v. *County School Bd.*, 391 U.S. 430, 439 (1968). There was no search for racial balance, no disregard of practicalities, and no evisceration of statutes. The case received earnest and complete attention from two able courts, in complete accord with this Court's decisions. The Petition's attempt to revive here a plan based on erroneous factual assumptions is wholly inconsistent with the established principle that the District Courts have broad discretion to evaluate competing plans when local school authorities default.

A. The "Two Court Rule" Bars Further Review.

All of the Petition's claims rely on the premise that the District Court "had before it two different plans both of which would eradicate school segregation 'root and branch' " (p. 2). This pervasive (pp. 2, 3, 4, 20, 28, 29, 30, 32, 34) premise in turn rests on the assertion (pp. 15, 22-25) that the Masters' projection of the results their plan

would obtain was accurate.[4a] The District Court, however, acting on the basis of evidence not considered by the Masters, found that those projections were wrong (App. 74a-75a; see Statement of the Case, part 2, above). The Court of Appeals agreed that "both as to racial composition and numbers of students in the districts, the new figures rendered the factual assumptions underlying the masters' determination clearly erroneous" (App. 14a n. 13). This Court should not review findings of fact concurred in by two lower federal courts, as would be required in order to accept any of the Petition's claims. E.g., *Berenyi* v. *District Director, INS,* 385 U.S. 630, 635 (1967).

B. This Case Presents No Issue of Disregard of Practicalities in Framing Desegregation Plans.

The District Court was not confronted with two "clearly satisfactory but different plans" (Petition, p. 28; accord, pp. 2, 30, 31, 32) but with a totally unsatisfactory plan. Aside from the fact that it left more than 6,000 students without seats in their home districts (App. 75a; see 15a n. 14), the Masters' Plan would have resulted in 29 schools 30% or less white and 34 schools 93% or more white. (See Statement of the Case, part, 2, above, for details.) The Petition's claim (pp. 22-25, 28) that the Masters' differing assessment of their plan's effects was accurate disregards findings of fact concurred in by two lower courts (App. 14a n. 13, 74a-75a).

The Court, of course, was not searching for racial balance (App. 68a, 70a), but the Masters' Plan would have preserved plainly segregated schools under the very standard the court had used in finding a constitutional violation. 379 F. Supp. at 424. See *United States* v. *Scotland Neck*

[4a] More accurately, the Petition relies not on the Masters' projections but on projections of its own (p. 23), which resemble the Masters' projections in some instances diverge still more widely from the figures found below, and were not advanced below. See page 5 above.

City Bd. of Educ., 407 U.S. 474, 489-90 (1972); *Keyes* v. *School Dist. No. 1*, 413 U.S. 189, 195-98, 199 n. 10 (1973). Nor was the racial composition of these schools unrelated to past discrimination: the court had previously found that the School Committee took numerous actions with the intent and effect of segregating the Boston public schools, and that its systematic program of segregation affected "all of the city's students, teachers and school facilities". *Morgan* v. *Hennigan*, 379 F. Supp. 410, 482 (D. Mass.), *aff'd*, 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

Practicalities can impede the desegregation of schools, but Boston is "a city where it has been possible to draw desegregated districts that are relatively small in numbers of students and to limit transportation distances to an average of 2.5 miles each way within a district" (App. 75a; see 19a). The City's area is not large, and the black population lives in an elongated area running down its axis. Plaintiffs Exhibits 290, 290A, 290C.[5] This case is thus very different from the cases cited in the Petition (p. 29 n. 21) and distinguished by the Court of Appeals (App. 19a n. 17).

The assertion (Petition, pp. 28-29) that the lower courts refused to consider factors such as the amount of busing, cost, community acceptance, and potential for resegregation is wholly mistaken. As shown above (Statement of the Case, part 1), the courts gave careful and successful attention to these factors, and there is not the slightest reason for this Court to review the particular balance they struck. No student was bused as much as 25 minutes, and average rides were 10-15 minutes. Compare *Swann*, 402 U.S. at 30; *Winston Salem-Forsyth Bd. of Educ.* v. *Scott*, 404 U.S. 1221, 1227 (1971) (Burger, C. J. Circuit Justice). Twenty-one thousand students were to be bused,

[5] A map similar to these exhibits may be found as Appendix E to the Boston Home and School Association's petition, No. 75-1466.

as compared to 17,000 bused under the State Plan, and more than 30,000 using buses or public transportation under the segregated system. App. 77a, 101a-102a. Compare *Swann*, 402 U.S. at 6, 30 (and Court of Appeals opinion, 431 F.2d at 143-45). Without imposing a uniform racial ratio, and indeed leaving eleven 95% white schools in East Boston, the court's plan promised to eliminate all other racially identifiable schools, bringing them within a range of about 30% to 70% white. App. 18a, 35a, 76a. Compare *Swann*, 402 U.S. at 9, 22-25.[6] The System's grade structure was left untouched, and students had the chance to stay in their own community school districts. App. 89a, 99a. Compare *Swann*, 402 U.S. at 9-10, 27-29.

While the Petition makes much of financial considerations, the record by no means demonstrates that the court's plan is significantly more expensive than the Masters' Plan, much less unreasonably costly. The court may have increased the amount of busing over that required by the Masters' Plan, though this is unclear. Masters' Plan, p. 52 and n. 1 (busing estimates ranging from 10,700 to more than 26,000); App. 15a n. 14. Any extra expense, however, could be expected to be borne by the state (App. 19a-20a), which supports the District Court's plan. On the other hand, the court reduced the number of magnet schools proposed by the Masters (Masters' Plan, App. E, p. 23; No. 75-1445, A. 177), thus saving money (though part of these schools' cost might also have been paid for by the state). And the court saved money by closing schools (App. 102a), though it did not go quite as far in this respect as did the Masters' Plan. Courts have rightly resisted claims that financial problems can justify denying students their right to a desegregated education.[7] If extraordinary expenses can justify adopting a plan which leaves segregated schools in existence, at the very

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[6] The District Court rejected a still more effective plan (App. 4a, 67a).

[7] *Goss* v. *Bd. of Educ.*, 482 F.2d 1044, 1046 (6th Cir. 1973), *cert. denied*, 414 U.S. 1171 (1974); *Clark* v. *Bd. of Educ.*, 465 F.2d 1044, 1046 n. 5 (8th Cir. 1972); *United States* v. *Texas Educ. Agency*,

least it is for those who support such a result to bear the burden of proving the need. See *Swann*, 402 U.S. at 26; *Green* v. *County School Bd.*, 391 U.S. 430, 439 (1968). Here, the Petitioner failed to do so — not even the city budget and tax rate were submitted below, much less a cost comparison between plans — despite his access to budgetary evidence. The financial assertions of the Petition (pp. 10-12) are just not part of the record.

Any theory that problems of "resegregation" made it improper to modify the Masters' Plan is still less plausible. Indeed, resegregation considerations *supported* the modification, as the District Court explained (App. 75a). If the Petitioner means that the possibility that desegregation might increase "white flight" from Boston schools should have molded the court's actions, he still fails to raise a significant issue on this record. First, the District Court, relying on expert testimony and the opinion of the Masters, found no adequate evidentiary basis for making such a prediction. App. 71a n. 7. Attempts to overthrow this finding by submitting new evidence on appeal did not succeed (App. 30a n. 29). See *Hills* v. *Gautreaux*, 44 U.S.L.W. 4480, 4483 n. 11 (1976). Second, this Court has held that fears of "white flight" and other resistance cannot "be accepted as a reason for achieving anything less than complete uprooting of the dual public schools system." *United States* v. *Scotland Neck City Bd. of Educ.*, 407 U.S. 484, 490-91 (1972); accord, *Monroe* v. *Bd. of Comm'rs*, 391 U.S. 450, 459 (1968); see *Milliken* v. *Bradley*, 418 U.S. 717, 747 n. 22 (1974); App. 32a-33a.[8]

467 F.2d 848, 875 (5th Cir. 1972); *Dowell* v. *Bd. of Educ.*, 338 F. Supp. 1256, 1272 (W.D. Okla.), *aff'd*, 465 F.2d 1012 (10th Cir. 1972); *Vaughns* v. *Bd. of Educ.*, 355 F. Supp. 1051, 1059 n. 23 (D. Md. 1972); see *Swann*, 402 U.S. at 28; *Griffin* v. *School Bd.*, 377 U.S. 218, 232-34 (1964).

[8] Even less persuasive is the Petition's suggestion (p. 28) that community preference for a more segregative plan could validate it when a better plan is available. In any event, no evidence of community preference was offered, and its relevance was not argued to the Court of Appeals. *Cf. United States* v. *Hinds County School Bd.*, 417 F.2d 852, 858 (5th Cir. 1969) (opinion polls). The District Court did shape its plan so as to promote community acceptance, as explained in the Statement of the Case, part 1, above.

Third, even assuming some relevant relation between desegregation and white flight, the record still furnishes no reason to believe that the Masters' Plan would have been so much less productive of white flight than the court's plan that it would be preferable, much less required. See App. 31a n. 30. Certainly it was not designed on the theory that desegregation would increase white flight, since the Masters regarded that theory as a "misleading fiction" (App. 71a n. 7).

The Masters' Plan, of course, was not the product of the local school authorities, who had repeatedly defaulted in their obligation to propose a viable remedy. App. 62a-67a. That default left the court with the power and duty "to fashion a remedy that will assure a unitary school system." *Swann,* 402 U.S. at 16. The Masters were appointed to provide recommendations to the District Court, not to supersede it. App. 14a n. 13. Although their plan was entitled to respect, it could not divest the District Court of its own duty to frame a plan eliminating the dual school system "root and branch", particularly since the plan was based on erroneous factual assumptions. App. 14a n. 13. While "the masters' report and recommendations contained the key elements and formed the foundation of the plan promulgated by the court" (*Morgan* v. *Kerrigan,* 401 F. Supp. 270, 272 (D. Mass. 1975)), the court properly reconsidered and improved the plan. Since those improvements were reached with full attention to all relevant factors, there is no reason for this court to depart from its practice of not reviewing the details of desegregation plans.

C. This Case Presents No Issue Under the Equal Educational Opportunities Act.

The Petition discusses (pp. 32-35) the Equal Educational Opportunities Act of 1974, 20 U.S.C. §§ 1701 et seq.,

but it fails to identify any issue raised under the Act on this record.

Tht one issue specified by the Petition (p. 2) — whether the Act required the court, "in choosing between two desegregation plans, both of which would have satisfied the constitutional mandate to eradicate segregation, to adopt the plan which involved less busing" — is simply not present. The Masters' Plan would have left 29 schools 30% or less white and 34 schools 93% or more white, and would have left thousands of students without community district seats. These failures were without any justification in terms of practicalities, as is shown by the court's success in framing an alternative. (See Statement of the Case, part 2, and Argument, part B, above.) The Petition's assertions to the contrary are based on factual claims rejected by both lower courts. (See Statement of the Case, part 2, and Argument, part A, above.) The District Court strove successfully to minimize busing; *fewer* students may now use transportation than did so under the segregated system. (See Statement of the Case, part 1, above.) Under these circumstances, to call the Masters' Plan constitutionally acceptable is wholly inconsistent with this Court's decisions. E.g., *Davis* v. *Bd. of School Comm'rs*, 402 U.S. 33 (1971); see *United States* v. *Scotland Neck City Bd. of Educ.*, 407 U.S. 484 (1972); *Swann*, 402 U.S. at 22-31. Even the assertion that the Masters' Plan would have required substantially more busing than the court's modifications is questionable (App. 15a n. 14).

Making "every effort to achieve the greatest possible degree of factual desegregation" (*Swann*, 402 U.S. at 26) of course requires a balancing process in which the removal of racially identifiable schools may sometimes yield to competing practicalities. This process was sensitively carried out by the District Court (e.g., App. 67a-77a), and carefully reviewed by the Court of Appeals (App. 13a-20a).

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Having ascertained that the District Court applied correct legal standards — including those laid down by the Act — to the facts without abusing its discretion, the Court of Appeals did not reexamine *de novo* all the merits and demerits of the Masters' Plan and court modifications, contenting itself with a considered finding that the District Court's preference was reasonable (App. 18a-20a). This approach is what the Petition seemingly refers to as making the Act meaningless (pp. 28, 33). The Act, however, does not purport to require *de novo* appellate review of every desegregation plan. What it does require, what the District Court did, and what the Court of Appeals reviewed, is resort to busing only as a last resort and only to the extent needed for the "removal of the vestiges of the dual school system" (20 U.S.C. § 1701(b)).

Since the Petition (p. 33) concedes that "Congress did not attempt to prohibit busing of students", it may be superfluous to add that the Act provides that it is "not intended to *modify* or diminish the authority of the courts of the United States to enforce *fully* the fifth and fourteenth amendments" (20 U.S.C. § 1702(b); emphasis added). See *Brinkman* v. *Gilligan*, 518 F.2d 853, 856 (6th Cir. 1975). Legislative history confirms that the Act, in the form finally adopted, was concerned with the priority of remedies and not with the prohibition of constitutionally required desegregation.[9] This Court had not explicitly specified the order of preference among remedies. It had, however, made clear that actual desegregration is required to the extent practicable in a school system pervaded by past discrimination, and that this requirement is not simply

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[9] Sen. Conf. Rep. No. 93-1026, 1974 U.S. Code, Cong. & Admin. News 4222. This view was shared by proponents of antibusing legislation [e.g., 120 Cong. Rec. S. 13378, 13384, 13351 (Sens. Gurney, Roth, Dominick); 120 Cong. Rec. H. 7403, 7417 (Reps. Waggoner, Hogan)] and opponents [20 Cong. Rec. S. 13349, 13378 (Sens. Pell, Javits, Muskie); 120 Cong. Rec. H. 7389 (Rep. Drinan).]

a matter of educational or judicial policy (see *Swann*, 402 U.S. at 16, 22, 28). Congress has no power — and the Act claims none — to authorize the continuance of unconstitutionally segregated schools. *Katzenbach* v. *Morgan*, 384 U.S. 641, 651 n. 10 (1966); see *Oregon* v. *Mitchell*, 400 U.S. 112, 128-29, 204, 249 n. 31 (1970); *United States* v. *Scotland Neck City Bd. of Educ.*, 407 U.S. 484 (1972); *North Carolina Bd. of Educ.* v. *Swann*, 402 U.S. 43 (1971); *Cooper* v. *Aaron*, 358 U.S. 1, 18 (1958).

The lower courts here gave the Act a full and sympathetic reading. The findings required by the Act were made (App. 101a-102a). Busing was minimized: only 21,000 out of 84,000 students were to be bused, a minor increase over the State Plan, and less than the number using busing or public transportation before desegregation started (App. 13a, 62a, 77a, 101a-102a). Extensive use of magnet schools, school closing, new construction already under way, and desegregative transfers fulfilled the Act's stress on alternative remedies. The community school districts responded to its emphasis on neighborhood schools. See Statement of the Case, part 4, above. Mere discussion of the significance of the Act cannot compensate for the absence of an issue arising under it. No such issue is raised by this record.

Conclusion

This Court has long recognized that the framing of desegregation plans upon the default of local school authorities is primarily a function for the District Courts. *Brown* v. *Bd. of Educ.*, 349 U.S. 294, 299 (1955); *Swann*, 402 U.S. at 28. Here, the default was contemptuous and continuing (App. 9a-13a, 43a-44a, 50a-51a, 62a-67a). The court then shaped a moderate plan for a complex school system on the basis of a massive record. App. 6a-7a. The Petition asks this Court to comb through that record and resurrect a plan which had to be modified when it

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became clear that it was based on erroneous student data. It relies on factual theories outside the record, claims not raised below, and assertions about the proceedings which are belied by the lower courts' painstaking and successful efforts to minimize busing and shape a plan which would be practical as well as desegregative. Only by such contentions can issues even arguably deserving of certiorari be summoned up. The issues are not there, and certiorari should be denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1441

KEVIN H. WHITE,
MAYOR OF THE CITY BOSTON,
PETITIONER

v.

TALLULAH MORGAN, ET AL.,
JOHN J. KERRIGAN, ET AL.,
MASSACHUSETTS BOARD OF EDUCATION, ET AL.,
RESPONDENTS

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Brief of Respondents Massachusetts Board of Education, et al., in Opposition to Certiorari

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RESPONDENTS

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Brief of Respondents Massachusetts Board of Education, et al., in Opposition to Certiorari

The respondents Board of Education and Commissioner of Education (hereafter collectively Board of Education) oppose the petition for certiorari of Kevin H. White, as Mayor of the City of Boston. The Board of Education has general superintendence over the Boston School Committee and must, under state law, see that the Committee complies with state and

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federal laws pertaining to education, including the United States Constitution. Mass. Gen. Laws c. 15, § 1G. The Board of Education also provides various state and federal funds for the operation of the Boston public schools. Mass. Gen. Laws c. 15, § 1G.

Although a defendant in the proceedings below, the Board of Education was found not to have violated plaintiff's constitutional rights. *Morgan* v. *Hennigan*, 379 F. Supp. 410, 476-77 (D. Mass. 1974). The Board remains a party in the case to assist with the formulation of remedies.

Question Presented

Whether the actual record in this case discloses any important, unresolved issue of federal law.

Opinions Below

The opinion of the district court as reproduced in Petitioner's appendix omits that portion of the opinion containing maps and descriptions of the racial compositions of the districts in the court's remedial desegregation plan (see A. 94a), as well as other portions (omissions noted at A. 90a, 98a, 99a, 108a). The complete opinion is contained in the appendix to the petition of the Boston School Committee, No. 75-1445, which will be cited as "B.S.C.A." References to the consolidated appendix that was part of the record before the court of appeals will be cited as "C.A."

Statement of the Case

On May 10, 1975, the district court issued a systemwide desegregation plan for the Boston public schools, to be implemented in the 1975-1976 school year. The finding of unconstitutional segregation had been made on June 21, 1974. *Morgan* v. *Hennigan*, 379 F. Supp. 410 (D. Mass.), *aff'd sub nom. Morgan* v. *Kerrigan*, 509 F. 2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975). During the interim 1974-1975 school year, the district court ordered the School Committee to implement, as a matter of federal law, a racial balance plan ordered by the Supreme Judicial Court of Massachusetts under a state statute (hereafter referred to as the Phase I plan, or Phase I). *See School Committee of Boston* v. *Board of Education*, 364 Mass. 199, 302 N.E. 2d 916 (1973). The Phase I plan achieved only limited desegregation.

In preparation for the development of a systemwide plan, the district court on October 31, 1974, issued guidelines and ordered the Boston School Committee to file a desegregation plan with the court on December 16, 1974 (A. 63a). The guidelines called for a plan that would minimize busing (A. 71a) and that would accomplish the greatest possible degree of actual desegregation, taking into account student safety and the practicalities of the situation (A. 63a). The Committee failed to file a plan on December 16, but later filed a "freedom of choice" plan that the district court eventually found to be unacceptable. Other parties also filed plans.

All of the plans filed, with the exception of one plan rejected as a matter of law, were referred to a panel of four masters. The February 7, 1975, Order of Appointment and Reference to Masters specified that the masters were "to conduct hearings and make recommendations for a desegregation plan . . . together with reasons for recommending that plan" (A. 14a).

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The masters filed their final recommendations on March 31, 1975. On April 7, 1975, the parties filed extensive objections and commentary on these recommendations. A number of parties, including the School Committee, commented that the masters' plan was in error as to its projected racial compositions for the districts. Certain filings recommended modifications, some of which were later adopted by the district court (C.A. 379-437, 460-537). The parties commented on each other's filings, including the proposed modifications. See, *e.g.*, Memorandum of Mayor In Opposition to Objections of State Defendants, filed April 15, 1975. The district court held hearings on proposed modifications to the plan on April 10, 15, 18, and 23, 1975. On April 17, 1975, all parties were given copies of the court's proposed revisions of the masters' plan, many of which were drawn from the parties' filings. The court heard argument on the proposed revisions on April 18, 1975, and received written comments on April 22, 1975. There was further opportunity for written comments to be filed up to the issuance of the court's plan on May 10, 1975.[1]

On April 10, 1975, the Boston School Department filed new data on the size and racial composition of the student body (A. 14a). This data established that many projections and statistics in the masters' plan were in error (A. 14a, n. 13; 15a, n. 14). The new data formed the basis for the court's modifications of the recommended plan (A. 14a). The court reduced the number of community school districts recommended by the masters from nine to eight and adjusted the boundaries of several districts (A. 14a).

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[1] This chronology established by the record disposes of the contention in the petition, at pages 18-19, that the district court was summary in its procedures. Further, despite the statements in the petition, there is no evidence in the record of the communications during this period between the court and the masters.

As the district court stated, "the masters' report and recommendations contained the key elements and formed the foundation of the plan promulgated by the court" (A. 14a). Both plans divided the city into geographic community school districts and a citywide district of magnet schools. Most of the features of the masters' plan praised in the petition as being highly innovative (see pages 14-16) are incorporated into the court's plan. The magnet school system maximizes voluntary integration. Individual schools are paired with specific universities, businesses, and cultural institutions (A. 84a-85a). Students and their parents are allowed to choose between a magnet school and remaining in their community school districts (A. 95a-96a). Councils of parents, students, and others have been established in each school, each district, and citywide (A. 86a-87a). Inadequate buildings have been closed (A. 83a-84a), and an administrator placed in charge of each school (A. 89a).

The court's plan creates community school districts ranging from 40 to 95 percent white (B.S.C.A 127-57). Individual schools may vary from the district composition by a percentage equal to $\pm$ one quarter of the racial composition of the district (A. 99a). In a system that was projected to be 51 percent white, the citywide magnet schools range from 56 to 46 percent white (A. 100a). East Boston, a 95 percent white area of the city with 5,700 students, is made a separate district (A. 76a). Eleven schools in that district are not desegregated because of the burdens of transportation that would be imposed (A. 76a). Prior to desegregation, 30,000 students, or 35 percent, were bused or used public transportation (A. 77a). During the operation of the Phase I plan, there was mandatory busing of 17,000 students (A. 101a-102a). Under the court's plan there is mandatory busing of 21,000 students (A. 101a). The average transportation distance within the districts is 2.5 miles, and the longest trip is less than 5 miles (A. 101a).

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Bus travel times average between 10 and 15 minutes, and the longest trip is less than 25 minutes (A. 101a). Wherever possible, students bused at one grade level, such as elementary school, are assigned to walk-in schools at the next level, such as middle school (A. 101a). Busing has been commonplace in the Boston public schools for decades; in 1972 the school committee leased 129 buses daily in addition to providing numerous passes for use of the public transit system (A. 77a).

Reasons for Denying the Writ

I. Introduction.

Petitioner does not seriously contend that the decision of the court of appeals is in conflict with the applicable decisions of this Court or with a decision of another court of appeals. The sole basis on which Petitioner seeks review is his claim that this case presents important, unresolved issues of federal law. The questions that the petition purports to raise are not presented by the record in this case, nor are they necessary to the decision of this case. Were a writ of certiorari to issue, the respondents respectfully suggest that this Court, after examination of the record, would find the writ to have been improvidently granted.

II. The Claims Made In The Petition Are Not Supported By The Record.

Petitioner argues that the district court was barred from adopting its own modified version of the masters' plan as the desegregation plan for Boston. He contends that the principles

guiding the court's equitable discretion and, independently, the Equal Educational Opportunities Act of 1974, 20 U.S.C. §§ 1701-1758, required instead that the court adopt the masters' plan without change. This Court need not consider the merits of these legal claims because the factual assertions made in their support have no basis in the record of this case.

A. *The Record Establishes That The Masters' Plan Would Not Have Achieved Substantially The Same Degree Of Desegregation As The Court's Plan.*

Petitioner's assertion, at pages 22-23, that the masters' plan would have achieved the same degree of desegregation as the court's plan is simply fictitious. The unattributed table at page 23 of the petition purporting to support the claim is contrary to facts in the record, and respondents are unable to ascertain the source of the table. The racial compositions of the districts for the two plans as they are actually contained in the record are set forth in a table in Appendix A to this brief.[2] In fact, the masters' plan would not have achieved either the racial compositions that it projected or those now claimed on its behalf in the petition.

1. The Masters' Projected Racial Compositions Were Based On Erroneous Data.

Petitioner largely overlooks the fact that the aspect of the masters' plan on which he principally relies, the projected racial compositions of the masters' proposed community school districts, were based on incorrect data[3] (*see* A. 14a, n. 13; 15a, n. 14; 74a). Two courts have held that the masters'

[2] Oddly, the petition's claimed racial compositions are not even the same as those set forth in the masters' plan it champions.

[3] For example, the masters projected the West Roxbury district to be 80 percent white. Based on corrected data, the district court found the same district to be 92 percent white (A. 14a, n. 13; 74a).

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racial compositions and number of students in the districts were clearly erroneous (A. 14a, n. 13; 15a, n. 14; 74a), and until the filing of this petition none of the parties disputed the existence of these errors (A. 14a, n. 13). Petitioner's new, unsupported arguments contradict not only the record but his own prior position (*see* Brief of Mayor filed in his appeal to the court of appeals, p. 24, n. 1), and there is simply no basis for accepting them.

Using the corrected data submitted by the Boston School Department, a brief examination of the amount of desegregation under the masters' plan reveals its inadequacy. With the 10 percent deviation allowed by the masters' plan, some 65 percent of the students in the community school districts would have been in schools 70 percent or more minority or white.[4] Within the community districts, 37 percent of the schools would have been more than 80 percent white or minority.[5] This would have happened in a system projected to be 51 percent white (A. 100a), in a city where the court found it "possible to draw desegregated districts that are relatively small in numbers of students and to limit transportation distances to an average of 2.5 miles each way within a district" (A. 75a). The court of appeals found that the district court's plan accomplished more desegregation than the masters' plan would have (A. 18a-20a), and Petitioner's unfounded assertion to the contrary, at page 24, should be rejected.

2. Petitioner's Method Of Comparing The Two Plans Is Misleading.

Petitioner attempts to compare the uncorrected projected racial compositions in the masters' plan with the actual racial

[4] *See* A. 15a, n. 14, and Masters' Plan, App. E, pp. 7-21. The districts involved are West Roxbury, Burke, South Boston, Madison Park, East Boston, and Jamaica Plain.

[5] 48 out of 131 schools.

compositions of enrollments in schools this year. Essentially, Petitioner assumes that the masters' projections and the likely reality under an implemented masters' plan would have been identical, while at the same time pointing to differences between actual compositions and those projected in the court's plan. This analytical sleight of hand is illogical and must be rejected. Moreover, it seeks to overthrow the court's plan with data not available until long after the plan was approved.

The factors that skewed the racial profile of actual student enrollments from those projected under the court's plan, such as abuse of the student transfer system,[6] would have had a similar effect on the masters' plan. Because the masters' plan was projected to accomplish less desegregation than the court's, the only reasonable inference, contrary to Petitioner's selective reasoning, is that these same factors would have operated to produce correspondingly less desegregation under the masters' plan, if it had been implemented, than the actual desegregation accomplished by the court's plan. Thus, the statement at page 22 of the petition that the court's plan achieves no more desegregation than the masters' plan requires a suspension of logical inference, and is contrary to the record.

B. *It Is Not Established That The Masters' Plan Would Have Required Less Busing Than The Court's Plan.*

The corrections to the erroneous data on which the masters' plan was based indicated that the plan would clearly have

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[6] *See* Memorandum and Orders Modifying Desegregation Plan, May 3, 1976, where the district court held, at p. 9: "Implementation of the May 10, 1975 plan has been handicapped by evasions of the court's order as to voluntary student transfers . . . reiminiscent of the exceptions contrived to nullify a controlled transfer policy . . . described in . . . the court's opinion on liability."

required more busing than the masters had projected, and perhaps no less than that required in the district court's plan.

The masters projected mandatory busing for 10,700 to 14,900 students, although their estimates did not include busing for safety, convenience, or special programs (Masters' Plan, pp. 51-52). In comparison, taking into account busing for safety, distance, and controlled transfer purposes, the court's plan estimated 21,000 students would be bused. Moreover, the transportation estimates in the masters' plan, like other figures, cannot reasonably be taken as accurate.[7]

The masters made serious errors in computing the numbers of students in the districts, thereby causing errors in their transportation estimates. As the court of appeals noted (A. 15a, n. 14), there were substantially more students in some districts than the masters had anticipated, and more students than the seating capacity for these districts would hold; many of these overflow students (of which there were 2,000 in one district alone) would have had to be bused to available seats (*id.*). As the court of appeals found,

> The Mayor's assumption that the court's plan would involve anything close to the mandatory busing of 6100 more students is therefore significantly vulnerable. (*Id.*)

The district court similarly found the estimates of busing in the masters' plan to be "then and now very doubtful" (Tr. 4/18/75, p. 96). Because of the poor fit between capacities and both numbers of students and racial compositions in the masters' proposed community school districts, the masters'

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[7] A preliminary indication of the infirmity of these figures is that the masters purported to bus from 2,100 to 6,300 fewer students than the 17,000 bused under the Phase I plan, while claiming to accomplish much more desegregation than the Phase I plan.

plan, in fact, might have required more busing than the court's plan. It cannot, in any event, be concluded that this case presents a choice between two plans, one of which involved less busing.

C. *Independent Grounds Supported The Court's Modifications Of The Masters' Plan.*

As the record demonstrates, there were, apart from the issue of the constitutionality of the racial compositions in the districts, independent bases supporting the district court's modifications of the masters' plan. Their common theme is that the masters' plan would not have worked, and the district court was required to adopt a plan that would work. *Green* v. *County School Board of New Kent County*, 391 U.S. 430, 439 (1968). Some of the deficiencies in the masters' plan are set forth below.

1. *Severe overcrowding.* Although the masters' plan, at page 35, "guaranteed" every student a seat in his community school district, in six of the nine districts there were considerably more students, by thousands in some districts, than there were seats (C.A. 388, 484-85). It is unreasonable to assume that all of these excess students would have chosen citywide schools or that their choice patterns as exercised in fact would have achieved the racial compositions projected by the masters for both the district and magnet schools. Further, because of facility closings and grade level designations, there would not have been enough middle school seats in the citywide schools for all excess district middle school students, the deficiency totalling almost 3,000 seats (C.A. 479). Some of the alterations made by the court in the community district lines proposed by the masters relieved this overcrowding. For example, revision of the West Roxbury/Jamaica Plain line, adding to Jamaica Plain, allowed full utilization of underenrolled Jamaica Plain middle schools (C.A. 477), while

revision of the West Roxbury/Hyde Park boundaries gave overcrowded West Roxbury an additional middle school (C.A. 477-78).

2. *Instability.* The masters' plan would have unnecessarily moved children who had been successfully transferred during Phase I to achieve integration, a problem alleviated by some of the court's revisions of district lines (C.A. 477, 491-96). Perhaps more importantly, as found by the district court (A. 75a), the widely disparate racial compositions of the masters' districts

> could result in the sort of residential instability that could destroy in a few years the desegregation accomplished initially in those districts. White parents seeking to leave a district where their children were a minority in the school population could move to districts with white majorities, gradually resegregating both the districts they left and those they entered. Just as the location of schools is acknowledged to have an effect on residential segregation, *Swann* . . . so large disparities in the racial composition of districts may endanger desegregation, and the court has an obligation to seek a plan that offers hope of lasting desegregation.

This finding was affirmed by the court of appeals (A. 18a).

3. *Unequal access to magnet schools.* Because of the precarious ratio of the races in several of the masters' proposed districts, students of the less numerous race (*e.g.*, blacks in West Roxbury and whites in Burke) would have had to be denied access to citywide schools of their choice in order to maintain whatever desegregation had been achieved in those districts (A. 75a, 18a). Thus, disparities in the masters' district racial compositions would have made it necessary "to

deny students entry to citywide schools because of their race and district of residence" (A. 75a). The modifications made to the masters' plan by the district court remedied this problem (A. 75a).

4. *Inequities.* The masters' plan closed an excessive number of schools in minority areas and converted a number of minority neighborhood schools to citywide schools (C.A. 401-04, 480-82). This would have aggravated a separate problem with the masters' plan: the imposition of a heavier burden of transportation on minority students (C.A. 491-505). The court's plan resulted in greater equity to the minority community (A. 84a).

III. The District Court's Plan Was In Accord With The Decisions Of This Court.

A. *The District Court Considered The Practicalities Of The Situation.*

Contrary to Petitioner's assertions, the record establishes that the district court gave careful consideration to the practicalities of the situation, in accordance with the decisions of this Court (A. 63a, 71a).

1. *Minimizing transportation.* The district court consistently attempted to minimize transportation in its guidelines for drafting a plan (A. 71a), its revisions of district lines (A. 71a, 77a), its use of magnet schools (A. 102a), its facility retention and closings (A. 83a), its transfer policy (A. 102a), its modification of the masters' assignment process to the use of geocodes (A. 79a), and its districting of East Boston as an intact, white district (A. 79a). The district court explicitly stated that it did not favor "forced busing" (A. 77a), and that its plan attempts to minimize it (A. 71a, 78a).

The amount, length, and duration of the busing required by the court's plan is reasonable under this Court's standards. Compared with the pre-desegregation transportation of 30,000 students and the mandated busing of 17,000 students under Phase I, the court's plan requires mandatory transportation of 21,000 students[8] (A. 101a, 77a). Within community districts the average travel distance is 2.5 miles; the maximum is 5 miles (A. 101a). Travel times average 10-15 minutes, with a maximum of 25 minutes (A. 101a). Many of the students who are bused travel shorter distances than those bused under the Phase I plan. The transportation ordered here is of far fewer students, for shorter distances, and for shorter lengths of time than that ordered in other desegregation cases. *See Northcross* v. *Board of Education of Memphis City Schools*, 489 F. 2d 15 (6th Cir. 1973), *cert. denied*, 416 U.S. 962 (1974) (and *see* 466 F. 2d 890, 895 (6th Cir. 1972)) (38,000 out of 145,581 students bused in system previously unfamiliar with busing); *Bradley* v. *School Board of Richmond*, 325 F. Supp. 828 (E.D. Va. 1971) (48,000 students in district; 10,500 bused before desegregation, 13,500 under interim plan, at least 20,500 under final plan); *Winston-Salem/Forsyth Board of Education* v. *Scott*, 404 U.S 1221, 1225, 1227 (1971) (Burger, C.J., denying stay) (50,000 students; busing increased from 18,000 to 34,000); *Kelley* v. *Metropolitan County Board of Education of Nashville*, 463 F. 2d 732, 741 (6th Cir.), *cert. denied*, 409 U.S 1001 (1972) (94,170 students; busing increased from 33,485 to 48,000). The transportation here is well within the limits established by this Court in *Swann* v.

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[8] If the district court had not issued its systemwide desegregation plan, the Phase I plan with its mandatory busing would have remained in effect under state law. *School Committee of Boston* v. *Board of Education*, 364 Mass. 199, 302 N.E. 2d 916 (1973). *See also School Committee of Springfield* v. *Board of Education*, Mass. Adv. Sh. (1974) 2031, 319 N.E. 2d 427 (1974), *cert. denied*, 421 U.S. 947 (1975).

Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).

2. *Community Acceptance.* The district court did not overlook the acceptability of its plan to the community. In its concern for the stability of the plan and that the burdens of the plan be equitably distributed (A. 84a), the district court was cognizant of the necessity to consider the long-run success of the desegregation process. The court's sensitivity on this point is manifest also in its attempts to avoid isolation of a particular racial or ethnic group (A. 75a, 79a, 99a), and to insure that particular educational entitlements such as the bilingual and special education programs (*see* Mass. Gen. Laws c. 71A and 71B, respectively) continue to be provided (A. 80a). Far from ignoring the concerns of the communities in Boston, the court provided for a large degree of community participation through the establishment of multi-racial school, district, and citywide councils (A. 103a-106a).

There was no error by the district court in refusing to consider "white flight." This Court has repeatedly held that "white flight" cannot "be accepted as a reason for achieving anything less than complete uprooting of the dual public school system." *United States* v. *Scotland Neck City Board of Education*, 407 U.S. 484, 490-91 (1972); *Monroe* v. *Board of Commissioners*, 391 U.S. 450 (1968). The flaws in Petitioner's argument were well expressed by the court of appeals (A. 31a-33a), and will not be repeated here. Further, as noted by both lower courts, it was not proved that white flight is causally related to desegregation, particularly given the heated dispute among experts on this question (A. 23a, n. 7; 30a-31a, n. 29). The masters themselves called the "white flight" contention "a misleading fiction" (Masters Plan, p. 65, n. 1).

Nor was the district court obliged to adopt a lesser degree of desegregation in light of community opposition. *Cooper* v. *Aaron*, 358 U.S. 1, 16 (1958). There is no evidence in the record of the acceptability of the court's plan as opposed to the

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masters' plan, and Petitioner cites only to selected materials outside of the record. A well orchestrated publicity campaign by parties such as Petitioner in support for the masters' plan cannot overcome the obligation of the district court to evaluate that plan for its effectiveness or obscure the fact that the masters' plan, in many respects, was unsound and fraught with errors.

3. *Cost Considerations.* Contrary to Petitioner's contentions, the district court made specific findings about cost considerations (A. 102a-103a), and attempted throughout its plan to minimize costs (A. 77a, 83a-84a, 88a). Thus, the question Petitioner claims to present, whether lower courts are obligated to make such findings, is a hypothetical one and not raised by the record here.

There is no evidence in the record that the masters' plan would have been less costly than the court's plan. As demonstrated above, the transportation estimates in the masters' plan were infirm. Petitioner failed to introduce any evidence at all in the proceedings below on the relative costs of the masters' plan and the court's plan. Indeed, Petitioner objected to the costs of certain elements in the masters' plan (C.A. 617-18, 624) and argued that the masters had failed to make findings that the costs of their plan were "reasonable and within the predictable, available limits of current budgets" (C.A. 613). Before this Court, Petitioner now reverses position and argues, at page 8, that the masters took such fiscal considerations into account. Petitioner did not raise this issue before the court of appeals (*see* Brief of Mayor filed in the court of appeals, p. 7) and should not now be heard on it.[9]

[9] The budget and tax assertions in the petition are also not based on evidence in the record. Moreover, while the tax rate in Boston is high, the $196.70 per $1,000 is based on assessments of about 25 percent of value. *See Town of Sudbury* v. *Commissioner of Corporations and Taxation*, Mass. Adv. Sh. (1974) 2405, 2420, 321 N.E. 2d 641, 648 (1974). The assessment

In contrast with his arguments before this Court, Petitioner did not contend before the district court that desegregation costs are unmanageable. Rather he asserted, in a document entitled Report on School Finances, Fiscal Year 1976, filed February 2, 1976, that

> with sound management and the establishment of organizational priorities, the School Committee could have fully complied with orders of the Federal Court and still maintained a balanced budget. *Id.* at 12.

Finally, state and federal financial assistance to Boston for its public schools for the first year of systemwide desegregation has increased substantially over prior years.[10]

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ratio varies throughout the city with the higest ratio, 40 percent, being applied to the black neighborhood of Roxbury as against a composite citywide residential ratio of 27.8 percent. *Id.* The Supreme Judicial Court of Massachusetts commented that "the process has lost contact with reality." *Id.* It is the black taxpayers of Boston who bear the higher taxes.

Further, while the overall tax rate in Boston has remained constant at $196.70 per $1,000 assessed valuation for the last several years despite inflation, that portion of the $196.70 that is the School Tax Rate was reduced from $48.91 in fiscal year 1975 to $45.41 in fiscal year 1976, the year at issue here. *See* "Fiscal Year — School Tax Rate Recapitulation" forms filed by City of Boston for fiscal years 1975 and 1976 with the Department of Corporations and Taxation of the Commonwealth of Massachusetts, copies of which were filed with the district court on May 7, 1976.

[10] The increase in state and federal assistance amounts to $36,679,000 over the prior year, for a total of over $122 million. Oral findings by district court, May 10, 1976 (transcript not yet available).

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B. *The Court's Plan Was Within Its Equitable Powers As Defined By This Court.*

The plan challenged here fell well within the parameters of the district court's equitable discretion as established by this Court in *Swann, supra,* 402 U.S. 1 (1971), and other cases. Petitioner's argument that this equitable discretion is more limited may be rejected as a matter of law.

While federal desegregation courts wisely give deference in the first instance to plans drafted by local authorities, if the authorities should default, the burden falls on the district court to fashion a remedy to assure a unitary school system. *Swann, supra,* 402 U.S. at 15-16. No such deference is owed to a plan drafted by masters appointed by the court to assist with the fashioning of the remedy. In the instant case, the district court's order of reference to the masters merely directed them to "conduct hearings and make recommendations"; it did not authorize them to make findings, entitled to deference under Fed. R. Civ. P. 53(e)(2). The scope of the masters' authority as defined by the court's order of reference is unchanged by the fact that this is a desegregation case. The court of appeals adequately answered Petitioner's contentions on this point (A. 14a).

The obligation on the district court was "to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." *Davis* v. *Board of School Commissioners of Mobile County,* 402 U.S. 33, 37 (1971). The court of appeals found that the district court had not exceeded this obligation (A. 18a-20a), and that

> [t]he amount of additional desegregation that was purchased by the court's plan was neither trivial nor disproportionately burdensome. (A. 20a.)

Petitioner has not met and cannot meet his burden of showing that there was an abuse of discretion or that the findings of the courts below were clearly erroneous.

IV. No Question Suitable For Review Has Been Presented Concerning The Equal Educational Opportunities Act Of 1974.

Petitioner argues that the Equal Educational Opportunities Act of 1974, 20 U.S.C. §§ 1701-1758 (the Act), requires district courts, in choosing between two constitutionally acceptable plans, to adopt the plan that requires less mandatory busing of students. The question whether Petitioner's interpretation of the Act is correct is not presented by this record or framed by this case.

The district court did not confront, as Petitioner suggests, a choice between two alternative remedial plans that were equally acceptable; the masters' plan did not achieve a constitutionally sufficient amount of desegregation (C.A. 379-413, 460-74), and was simply not workable. *Green, supra,* 391 U.S. at 439. The Act expressly disclaims any modification of the judiciary's power to enforce Fourteenth Amendment rights. 20 U.S.C. § 1702(b). The Act also preserves the range of the district court's discretion, described in *Swann,* to ascertain whether a particular plan will or will not work. *See Brinkman* v. *Gilligan,* 518 F. 2d 853 (6th Cir. 1975).

Petitioner's argument that the Act somehow limits the equitable discretion of the district court must also be rejected as a matter of law. *See North Carolina State Board of Education* v. *Swann,* 402 U.S. 43, 45-46 (1971). This Court has consistently interpreted similar statutes as not intending to withdraw from courts their historic remedial powers and has thus avoided any question about the possible unconstitutionality

of such statutes. *Swann, supra,* 402 U.S. at 16-18 (Civil Rights Act of 1964, Tit. IV, 42 U.S.C. § 2000c); *Drummond* v. *Acree,* 409 U.S. 1228 (1972) (Powell, J.) (Education Amendments of 1972, Tit. VIII, § 803, 20 U.S.C. § 1653). It is not "meaningless," as Petitioner suggests, to read the Act as in harmony with the equitable standards established by this Court. Any other reading would unnecessarily call into question the constitutionality of the Act.

What the Act does do is create a preference or priority listing of remedies for Fourteenth Amendment violations. The court, then, is required to make findings about the efficacy of particular remedies. 20 U.S.C. § 1713. In this case the district court made the mandated findings (A. 101a-102a); its plan revised attendance zones and grade structures, provided for the construction of new schools, closed old schools, allowed a controlled transfer policy, and created magnet schools in order to minimize mandated transportation (A. 102a). Petitioner did not contest these findings in either of the courts below and presents no issue here worthy of review.

V. This Court Should Exercise Its Discretion To Decline Review.

Finally, this Court should exercise its discretion against review because, in Respondents' view, denial of the writ is proper and will best serve the increasingly stable movement toward a unitary system in Boston. The realization by the officials and people of Boston that desegregation is inevitable is of primary importance. As the district court recently stated in its May 3, 1976, Memorandum and Orders Modifying Desegregation Plan, at pages 2 and 4:

> Some parties have encouraged a popular misconception that, if only sufficient pressure can be brought against the plaintiffs, the school department, members of monitoring councils and the court, the plan may be set aside by the trial court. . . .
>
> . . . . . .
>
> The urgent need, in our opinion, is not official reaction to crises, however commendable that may be, but official acceptance of the constitutional necessity and inevitability of public school desegregation and public commitment by elected officials to support school administrators and teachers and parents and students who are doing their best to bring it about.

In spite of official resistance (A. 43a) and the misleading statements by elected officials that they are for school desegregation but against forced busing (A. 77a), the process of desegregation is under way in Boston. That process would be ill-served by further unnecessary review.

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Conclusion

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Districts	District Racial Compositions Projected in Masters' Plan	Accurate Masters' District Racial Compositions as Found by Court	± 10% Deviation for Each School Based on Accurate Data	District Court Plan's Racial Compositions for Districts	Comments
1. Brighton — Mission Hill	white black other 50% W 50W 30B 20o			52W 22B 26o	Master's district not changed by district court
2. Jamaica Plain	40% W 40W 40B 20o			55W 30B 15o	
3. West Roxbury	80% W 80W 15B 5o	92% W 92W 5B 3o	100% W	62W 34B 4o	
4. Hyde Park	48% W 48W 48B 4o			66W 32B 2o	
5. Dorchester	50% W 50W 43B 7o	45% W	35% W	54W 40B 6o	
6. Burke	50% B 25W 50B 25o	63% B 27W 63B 10o	73% B		This district was eliminated in the court's plan by being merged with adjacent districts
7. South Boston	60% W 60W 30B 10o	67% W	77% W	62W 23B 15o	
8. Madison Park	30W 50B 20o			46W 29B 25o	
9. East Boston	95W 3B 2o			95W 3B 2o	District unchanged in court's plan

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OCTOBER TERM, 1975

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KEVIN H. WHITE,
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Petitioner,

—v.—

TALLULAH MORGAN, *et al.*, and
JOHN J. KERRIGAN, *et al.*,

Respondents.

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

1. This case presents two important issues concerning the extent to which, as a matter of law, courts are precluded from considering such practicalities as comparative costs, community support, amount of busing, and potential for resegregation in choosing among a number of plans, each of which will eradicate school segregation. In petitioner's view these issues are of major significance not only to Boston but to the future of meaningful desegregation and civic vitality in urban areas throughout the country.

This view has received strong support before this Court. First, the Cities of Cleveland and Wilmington have filed a Brief Amici Curiae supporting a grant of certiorari and detailing the impact of this litigation on these two and other similarly situated cities. Second, the Solicitor General of the United States in his recent oral argument in *Pasadena Board of Education* v. *Spangler*, O.T. 1975, No.

75-164 (argued April 27-28, 1976), indicated to the Court that, in his view, the Court should seriously consider a grant of certiorari in an appropriate case to examine the law on school desegregation remedies. (Tr. 29-30.) This is such a case.

2. Although they attempt, as we note later (pages 4-7 below), to present this case to the Court on a factual basis explicitly rejected by both the Court of Appeals and the District Court, the Respondents Morgan *et al.* (hereinafter "Private Respondents") and Massachusetts Board of Education (hereinafter "Board Respondents") barely mention the important legal issues presented to the Court for the first time by this petition.

(a) *The Refusal to Consider Practicalities.* As we demonstrated in our Petition at pages 20-21 and 27, the District Court in issuing its desegregation plan, and the Court of Appeals in affirming it, held that such factors as the amount of busing, cost, community acceptance, and potential for resegregation could not be considered by a court in choosing between satisfactory but different plans to remedy urban school segregation. (App. 19a; 29a-32a; 71a-72a; 102a-103a). As a consequence, the courts below chose to impose the most costly plan, the plan most burdensome to students, the plan least acceptable to the community, and the plan most likely to cause resegregation in the schools. This result is contrary to the Court's commands in *Davis* v. *Board of School Commissioners,* 402 U.S. 33, 37 (1971), and *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 31 (1971), to adopt "realistic," "effective," and "practica[l]" plans. It is also contrary to common sense and the principles of equity and unnecessarily disruptive of a city's social fabric to impose

extreme remedies where moderate ones will fully cure constitutional violations. See *Brown* v. *Board of Education II*, 349 U.S. 294, 300 (1955).

The Private Respondents' brief does not even address this critical legal issue. The Board Respondents' only comment on this legal issue is to repeat the holding of *United States* v. *Scotland Neck City Board of Education*, 407 U.S. 484, 490-91 (1972), that such factors cannot be considered in determining whether a plan is constitutionally satisfactory. (Board Br. Op., p. 15.) As pointed out in the Petition at pages 29-31, that is true but irrelevant because the issue here is whether such factors may be considered in choosing *between* constitutionally adequate alternatives.

(b) *The Equal Educational Opportunities Act of 1974.* In view of this Court's finding in *Swann* v. *Charlotte-Mecklenburg Board of Education, supra*, 402 U.S. at 14, that school desegregation remedies had been "imperfect," Congress passed the Equal Educational Opportunities Act of 1974, 20 U.S.C. §§ 1701 *et seq.* The Act was not intended to diminish the courts' authority to remedy constitutional violations, but was designed to end unnecessary busing by explicitly precluding the imposition of busing orders more severe than necessary to remedy particular constitutional violations. 20 U.S.C. §§ 1702, 1712. Despite the plain meaning of the Act, however, the Court of Appeals held that once the District Court found that some busing was necessary to accomplish desegregation, the Act had no effect whatever and the District Court had unfettered discretion to order however much busing it chose:

> "Since this argument [that the Act precluded the District Court from ordering more busing than constitutionally required] concerns the District Court's dis-

> cretion in determining the adequacy of the remedy, and, therefore, gains nothing from the Act, which leaves that discretion unaffected, it must stand or fall upon those traditional principles of equity which would govern this issue even were the Act not in existence." (App. 17a-18a.)

Both Respondents' arguments to this Court are simply a repetition of the Court of Appeals' contentions on this issue. (Br. Op., pp. 16-17; Board Br. Op., pp. 19-20.) These contentions entirely disregard the explicit contrary language of 20 U.S.C. § 1712 and, of course, render the Act meaningless. Such a result is plainly wrong, not only because it totally disregards a clear congressional judgment on an important matter of social policy, but also because it is disruptive of meaningful and long-lasting desegregation in Boston and elsewhere.

3. For the most part, both Respondents' claims come down to a recitation of contentions which they insist show that the Masters' plan would not have provided a constitutionally satisfactory remedy for the segregation found to exist in the Boston school system and that, accordingly, the important issues described above are not actually presented in this case. (Br. Op., pp. 3-6, 10-14; Board Br. Op., pp. 6-7, 19.) That claim suffers from two fundamental defects.

(a) *The Masters' Plan Was Never Found To Be Constitutionally Deficient.* Both the District Court and the Court of Appeals conspicuously declined to find that the Masters' plan was constitutionally insufficient or that the added burden imposed by the District Court's plan under review here was necessary for a constitutionally sufficient

remedy. The trial judge stated in open court that in choosing between the Masters' plan and the plan involved here "constitutional considerations [were] only secondary . . . ." Transcript of April 15, 1975, Hearing, pp. 7-8, 32. Moreover, the Court of Appeals stated that the differences between the Masters' and District Court's plans in amount of desegregation, although "not trivial," were "slight" and indicated that it could not determine that the differences between the Masters' plan and the District Court's plan were of constitutional significance. (App. 20a.) Thus, Respondents' major claim as to the Masters' plan not only has no basis at all in the record but was rejected by both lower courts.

(b) *Without Regard to the Masters' Plan, the Lower Courts Were Obligated To Formulate the Least Burdensome Constitutionally Adequate Plan.* By belaboring the Masters' plan and peripheral questions of its adequacy, Respondents misconceive the thrust of the Mayor's Petition. While we believe the Masters' plan was a satisfactory alternative, that is not essential for the legal question presented by the Petition. The point is that the courts below were obligated, both by traditional principles of equity and by the Equal Employment Opportunities Act of 1974, to consider the factors discussed in the Petition and to formulate a constitutional remedy which does not impose unnecessary burdens on the community. This is a duty the courts had regardless of the adequacy of the Masters' plan, and this the courts refused to do. The simple fact is that neither court below ever found that the District Court's plan, with its expensive, burdensome, and disruptive requirements, was the only, or the least onerous, satisfactory alternative for desegregating Boston's schools.

4. Respondents next claim that the Masters' plan projections were inaccurate and that the Masters' plan would not have worked. (Br. Op., pp. 2-5; Board Br. Op., pp. 7-8, 11-13.) In Petitioner's view, these subsidiary factual claims Respondents seek to raise are irrelevant to the pending legal issues for the reasons described in the preceding section. They are also incorrect.

Respondents base their claims on the contention that more recent data provided by the School Department after the Masters had rendered their recommendations demonstrated inaccuracies in the number of places available in certain schools and the racial composition of the the student bodies. In fact, the compiler of the data testified that the new numbers were not significantly different from the data upon which the Masters' plan was based.[1] Numbers in this area are only estimates even of the situation which will develop between their collection and publication, much less of a future school year. As demonstrated by the table on page 23 of the Petition[2] it has turned out that the actual

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[1] Deposition of John Coakley, chief desegregation planner, Boston School Department Educational Policy Center, p. 51. As described in the Petition at pages 19-20, the District Court neither consulted the Masters about the new data nor attempted to make technical adjustments in the Masters' plan to overcome the changes supposedly shown by the new data. Rather, he abruptly rewrote the Masters' plan.

[2] Respondents claim that the data set forth in the table on page 23 of the Petition are inaccurate. In fact, these data are taken from Appendix E of the Masters' Report, for the Masters' plan; from the District Court's opinion, for the District Court's plan; and from actual enrollment data submitted to the District Court on February 9, 1976, for actual enrollments. The figures used exclude kindergarten because kindergarten students are not part of the District Court's plan and because including kindergarten skews the racial composition of the school district enrollment. Evidently, due to a lack of parochial and private school kindergartens in and around Boston, many students who attend such schools commencing in first grade attend public school kinder-

enrollments as of February 6, 1976, were closer to those predicted by the data used by the Masters' plan than by the data used by the District Court.

It is in large part due to the superiority of the data used by the Masters that the Private Respondents are now compelled to admit that the District Court's plan "is not so desegregative as hoped." (Br. Op., p. 5.) The Board Respondents, however, contend that it is unfair to judge the District Court's plan by its actual performance. They claim that since the District Court's plan did not work out as predicted, it is reasonable to infer that the Masters' plan would also have been less successful than predicted. (Board Br. Op., p. 9.) This argument ignores the critical fact that the District Court's plan was less successful than predicted precisely because the court in imposing the plan refused to consider the factors such as community acceptance and resegregation discussed in the Petition at pages 16-18, whereas the Masters' plan had carefully considered each of them.

5. Both Respondents also suggest that the lower courts actually considered factors such as the amount of busing, cost, community acceptance, and potential for resegregation. (Br. Op., pp. 2-3, 10-14; Board Br. Op., pp. 13-17.) Respondents' statements in this regard are incorrect. In fact, the lower courts simply had no clear picture of the legal standards to be applied in the present case and as a result refused to consider these important factors.

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gartens. The result is that Boston's kindergartens are now approximately 65% white while the rest of the school system is now less than 50% white. Accordingly, the table reproduced as Appendix A to the Board's Brief in Opposition, which apparently includes kindergarten students, simply presents a misleading picture of the school population.

(a) *Amount of Busing.* Respondents contend that reduction of busing was a "repeatedly emphasized goal" in the Courts below. (Br. Op., p. 2; see also Board Br. Op., p. 13.) In support of this proposition, they cite statistics dealing with the length of the bus rides, with the percentage of the total students bused, and with the number of students bused under a prior State plan.[3] None of this litany of statistics is relevant to the present issue. The salient fact is that the Masters' plan would have accomplished the same amount of desegregation by busing 15,000 students instead of the District Court's 21,000 students[4] and that the courts below failed to compare the plans on this basis.

(b) *Costs.* Both Respondents state that the courts below made findings as to costs. (Br. Op., p. 2; Board Br. Op., p. 16.) We agree that the District Court made some findings with respect to the costs of its own plan. What it failed to do was to make any findings with respect to the cost of the Masters' plan, or any findings relating to the increase in costs imposed under its plan by virtue of the

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[3] They also cite statistics to the effect that 30,000 students either were bused or used public transportation prior to the desegregation plan. (Br. Op., pp. 2, 17; Board Br. Op., pp. 5, 14.) Even if true, this shows nothing because it compares students *voluntarily* using public transportation to those *mandatorily* bused under the present plan.

[4] The Board Respondents quarrel with these numbers. (Board Br. Op., pp. 9-10.) These figures are taken from the District Court's opinion for its plan (App. 77a), and from the Masters' Report, for the Masters' plan (M. R. 51-52). The District Court made no finding which suggested the inaccuracy of either figure. The Court of Appeals did suggest that the Masters' number might be "open to some doubt" (App. 14a and 15a n.14) but it expressly declined to make any finding in that regard. Indeed, in its decision the Court of Appeals assumes the correctness of both the Masters' and the District Court's numbers. (App. 14a-15a.)

greater amount of busing, need for greater numbers of school safety personnel, and the like.

(c) *Community Acceptance and Resegregation.* Respondents claim that the lower courts considered community acceptance and avoidance of resegregation and simply concluded that no such problems with the plan imposed were proven. (Br. Op., pp. 13-14; Board Br. Op., pp. 15-16.) In fact, the lower courts did no such thing. Rather, with respect to resegregation, the District Court merely referred in a footnote to the Masters' finding on the subject, which it did not adopt on the grounds that consideration of resegregation "would be presumptuous." (App. 71a, n. 7.) Moreover, both the Court of Appeals and the District Court found that considerations of community acceptance and potential for resegregation were irrelevant and could not be considered by the courts. (App. 19a, 29a-32a, 71a-72a.)

6. Finally, the Private Respondents, without making any particular legal argument in this regard, complain generally that a number of the defendants urged different and even inconsistent positions on the courts below. It is quite true that Petitioner White, the Mayor of Boston, has taken a different position in this litigation than others of the defendants below. The Mayor was not a party to this litigation during the District Court's consideration of liability and no party has ever suggested that the Mayor had any responsibility for segregation of the Boston schools. It is, therefore, understandable that the Mayor's position has been different from that of the other parties defendant. Indeed, throughout his participation in the Boston school desegregation litigation, the Mayor's view has been that

the school children of Boston are entitled to remedies necessary to satisfy the requirements of the Constitution.

This does not mean, however, that the Mayor must agree with Respondents in their pursuit of the most extreme remedy. Unlike Respondents, and, for that matter, unlike the School Committee, the Mayor has overall responsibility for the City's public safety, finances, and general welfare. The Mayor's interest in these proceedings is the maintenance of Boston's social stability and financial integrity among the far reaching changes required to protect the constitutional rights of the City's school children. For this reason, the Mayor consistently urged the courts below to consider the practicalities of the situation in restructuring the City's schools in order to avoid a disruptive impact on the social framework of the City, on the City's ability to meet the needs of its residents, and on the prospects for meaningful desegregation.

CONCLUSION

For the reasons stated in the Petition and in this Reply, the issues raised by this Petition are of major importance to the future of meaningful desegregation in the Nation's cities and are worthy of full consideration by this Court. The Petition for Certiorari should be granted.

Respectfully submitted,

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